

Gayston Corporation and International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, and its Local 768 and Althia Piercy. Cases 9-CA-14838-4, 9-CA-15970, 9-CA-17347, and 9-CA-16850

October 8, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND
ZIMMERMAN

On June 11, 1982, Administrative Law Judge Thomas R. Wilks issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Gayston Corporation, Dayton, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order, as so modified:

1. Substitute the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly:

"(b) Expunge from its files any reference to the layoff of Althia Piercy and notify her in writing that this has been done and that evidence of this discriminatory layoff will not be used as a basis for future personnel actions against her."

2. Substitute the attached notice for that of the Administrative Law Judge.

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
- To refrain from the exercise of any or all such activities.

Accordingly, we give you these assurances:

WE WILL NOT threaten to discharge employees who join the Union, or who engage in union or other protected concerted activities, including seeking the assistance of the Occupational Safety and Health Administration of the U.S. Department of Labor (OSHA), or other Government agencies for the purpose of improving working conditions of employees.

WE WILL NOT coercively interrogate our employees concerning their own and other employees' union sympathies.

WE WILL NOT coercively interrogate our employees concerning their union membership and/or their motivations for joining the Union.

WE WILL NOT order any employees to assist us in unlawful interrogation of other employees' union sympathies.

WE WILL NOT attempt to give our employees the impression that we are monitoring the union sympathies of employees and/or surveilling their union activities.

WE WILL NOT imply to our employees that they will be discharged if they do not withdraw membership and support from the Union.

WE WILL NOT unlawfully encourage and unlawfully assist employees in withdrawing membership and support from the Union.

WE WILL NOT encourage employees to assist us in unlawfully encouraging other employees to withdraw union membership.

WE WILL NOT unlawfully provide information, materials, and personal assistance to em-

ployees, and expressions of personal gratitude to employees in pursuance of an unlawful scheme to encourage and aid employees to withdraw membership and support from the Union.

WE WILL NOT attempt to induce employees to eavesdrop and report back to us conversations of union members.

WE WILL NOT discriminate against employees because of their union membership and activities by placing them on forced leaves of absence, or by assigning them to work which is personally onerous and burdensome to them for no justifiable business reason.

WE WILL NOT, without bargaining and agreement with International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, and its Local 768, as the exclusive bargaining agent of employees in the appropriate unit, in breach of our obligations under Section 8(d) of the Act, unilaterally modify or change the wages, benefits, or other terms or conditions of employment set forth in the collective-bargaining agreement with said bargaining agent; or without notice to and giving said bargaining agent an opportunity to request bargaining, unilaterally institute or change any other benefits, or terms or conditions of employment of employees in said appropriate unit which is set forth as follows:

All production and maintenance employees employed by Gayston Corporation at its Dayton, Ohio facility including group leaders, inspectors, material handlers, janitors, job setters, operators, toolroom employees, and assemblers, but excluding all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

WE WILL NOT attempt to give to our employees the false impression that the Union is opposed to our granting of bonuses to our employees, or that your retention of any bonus or other benefit will be jeopardized because the Union filed with the Board and sought prosecution by the Board of an unfair labor practice charge concerning the unlawful unilateral manner in which such bonus or benefit was granted, and we assure you that nothing herein shall be construed as requiring us to withdraw any bonus or wage increase or other benefit presently enjoyed by our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL, if we have not done so already, offer to Althia Piercy immediate and full reinstatement to a position for which she has demonstrated or will demonstrate, upon an opportunity provided by us, a capability of performing without adverse physical reactions if such position is available, or reinstate her to such position when it next becomes available, without prejudice to her seniority or other rights and privileges, and make her whole, with interest, for any loss of pay she may have suffered as a result of our discrimination against her because of her union membership and activities.

WE WILL expunge from our files any reference to the discriminatory layoff of Althia Piercy and we will notify her in writing that this has been done and that evidence of this unlawful layoff will not be used as a basis for future personnel actions against her.

GAYSTON CORPORATION

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge: This case was heard at Dayton, Ohio, on August 10 and 11 and December 1, 2, and 3, 1981, pursuant to charges filed by International Union of Electrical Radio and Machine Workers, AFL-CIO-CLC, and its Local 768, herein called the Union, and Althia Piercy, an individual, against Gayston Corporation, herein called Respondent, and various complaints and consolidated amended complaints issued thereafter by the Regional Director for Region 9, and an order consolidating Case 9-CA-17347 with Cases 9-CA-14838-4, 9-CA-15970, and 9-CA-16850, issued by me on November 10, 1981. The complaints allege violations of Section 8(a)(5) of the Act by the granting by Respondent of a wage increase and bonus to bargaining unit employees without affording notice to and opportunity for bargaining with the exclusive bargaining agent of unit employees, violations of Section 8(a)(3) of the Act by Respondent's discriminatory treatment of employees Althia Piercy and Debra Gilmore, and multiple violations of Section 8(a)(1) of the Act by engaging in various acts of unlawful interference with employees' Section 7 rights.

All parties were given full opportunity to participate, to produce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs were filed by both Respondent and the General Counsel.

Upon the entire record of the case, and from my observation of the witnesses, and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

At all times material herein, Respondent, an Ohio corporation, has been engaged in the manufacture of aircraft accessories at its plant in Dayton, Ohio, at which for a representative period of time of 12 months preceding the original complaint herein it shipped products and goods valued in excess of \$50,000 directly to places outside the State of Ohio.

It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

It is admitted, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent is engaged in the production of defense hardware under contract or subcontract to Federal Government procurement agencies. At the time of the hearing it employed about 150 hourly rated employees at a plant complex consisting of two adjoining buildings in Dayton, Ohio. On April 27, 1979, the Union was certified by the Board, pursuant to a secret-ballot election held in October 1978, as the exclusive bargaining agent for the production and maintenance employees at the Dayton plant. Thereafter, collective bargaining resulted in agreement and execution on November 28, 1979, of a contract which expired in November 1981. At the time of the hearing, a new contract had been agreed upon.

The precise extent of union activity that occurred after March 28, 1978, is unknown, but the record reveals that union meetings were conducted and union leaflets were distributed, one of which contained remarks which Respondent considered a disparagement, and that according to Personnel Director Burdzinski hundreds of grievances were processed. According to Chief Steward Sondra Johnson, in 1980 about 50 grievances were processed.

B. 8(a)(1) Allegations—Facts

1. The summer of 1980—OSHA investigations—troublemakers

In January 1980, an unsigned notice was posted in the plant lunchroom under circumstances which I conclude justify an inference that the notice was authored by or at the least adopted by Respondent. In that notice reference was made to employees who appeared to desire disruption and loss of Respondent's business by deliberately sabotaging its product and by complaining to DESC¹ that Respondent permitted certain work to be performed by hand at employees' homes. Further reference was made to unidentified employees who were allegedly "constantly" trying to cause harm to Respondent and who had contacted OSHA that week and caused that

¹ Defense Electronic Supply Center, herein DESC, is the source of Respondent's munitions contracts.

governmental agency to make "needless inspection" which might result in costly fines that would cut profits and jeopardize future wage increases. The memo called for a cessation of such "negative thinking" and a statement that Respondent "must and will put an end to all of this. . . ."²

Respondent's vice president in charge of manufacturing, Robert Alexander, testified that a representative of DESC had called him and informed him that some unnamed employees had contacted DESC and reported that Respondent was not fulfilling its contract by assigning certain work to be performed by employees at home. Why this report was considered detrimental is unclear because Alexander testified that such work assignment was clearly permissible under the DESC contract. However, the Union had raised a question to Respondent as to why some unit work was being assigned as work to be performed in the employees' homes. Alexander also testified that over the period of 1978 through 1979 several OSHA investigations of Respondent's facilities had resulted in findings of violations of the Act administered by that agency and that several fines had been levied on Respondent. Further, according to Alexander, in early 1980 additional OSHA investigations occurred at Respondent's facilities.³

On or about March 17, 1980, employee Eunice Fleming wrote a letter to Respondent President Mark Stone wherein, according to her uncontroverted credited testimony, she stated that she was satisfied with her 35-cent-per-hour merit review raise, but criticized the method of the review itself and suggested it be changed. On March 26, she received a letter from Stone which, *inter alia*, identified her as "among a group that actively supports a wage structure established through a union-labor agreement," and pointed out that under the union contract her raise could have been 9-1/2 cents per hour but was higher under the merit review system, and expressed chagrin that she was unhappy with "Gayston Corporation, its supervisors, and its management." The letter concluded: "My suggestion for you, Eunice, would be either to accept Gayston, its management, and its policies or to find a job at another company which is operated more to your liking."⁴

On April 2, 1980, an unsigned notice was fixed, under glass cover, Respondent's bulletin board near the plant entrance where other Respondent notices to employees are usually posted, and under circumstances where I conclude that the notice was posted by or adopted by Respondent. That notice set forth a query therein as follows: "Why does the IUE continually try to stir up our employees [by making certain disparaging characterizations of the Respondent in a leaflet distributed by the

² Evidence of this incident was adduced only for purposes of setting the background.

³ OSHA refers to the Occupational Safety and Health Administration of the U.S. Department of Labor.

⁴ Stone's letter was not alleged as a violation of the Act but was adduced solely as evidence of Respondent's hostility toward employees who complain about matters of mutual concern to all employees, i.e., the method of effectuating the merit review affects all employees. Fleming was shop steward in the late summer of 1980. Her status in March is unclear.

Union].” The notice asserted that the Union desires the employees’ “hard earned money in the form of Union dues,” and reminded employees of their right to join or not join the Union. There is no union-security clause in the contract.⁵

On June 18, 1980, according to Alexander, Respondent had been in the fourth day of an ongoing OSHA investigation, employees had inquired as to the identity of the investigators, and the OSHA agents had requested permission to interrogate employees on Respondent’s premises. Therefore Alexander testified that he decided to address the employees in order to advise them of the visitor’s identity and their availability for employee interviews and to discuss the complaints filed with OSHA which he felt were unwarranted. Accordingly, on June 18, Alexander prepared and delivered a speech to four groups of employees from each shift and building.

According to Alexander and Respondent Personnel Director Bernard F. Burdzinski II, Alexander delivered *verbatim* and without deviation a prepared speech, the text of which was adduced into evidence. That speech alluded to the then-current OSHA investigation, and advised that Respondent had agreed to private interviews of employees on the premises, and further contained on its face a recitation of complaints filed with OSHA to which largely unprepared extemporaneous comments were made as to each complaint. Within the text of the speech, employees were told of their rights to complain to OSHA but were urged to alternatively utilize the existing employer-employee safety committee. In the prepared text, Alexander proceeded to disparage the motivations of employees who had resorted to OSHA, as persons who desired to “cause problems for the company and keep trouble stirred up.” The current OSHA complaint was referred to as only one incident evidencing conduct by “certain people” who were characterized as “constantly trying to cause disruption, trouble and [to] run the company down in many ways.” Employees were urged to cooperate with the safety committee. The then-current complaints filed with OSHA were characterized as the product of unnamed “trouble maker or trouble makers who are trying to jeopardize your job and the future of the Company,” and that such were “. . . an unfair and unjust accusation against the Company and we should put a stop to it now.”⁶ The speech also complained that other unspecified “things” were being done by “certain people” which “downgraded” Respondent, “jeopardized” its future, and kept “things in a constant turmoil.” Those persons were accused of self-interest and characterized as being bereft of interest in Respondent’s well being, and aware that they are “wrong.” The speech purportedly ended with the following:

Now I am going to Give You Bob Alexander’s Opinion of the Situation as it stands today.

1. Gayston will run their own business in their way to benefit their employees in the best possible way.

⁵ Evidence of the April notice was also adduced solely for background purposes, i.e., evidence of union animus.

⁶ Alexander testified that he had possessed no idea as to the identity of the troublemakers, but testified further that he would like to have known.

2. Gayston will survive one way or the other, with or without the help, and cooperation of the employees who seem to be causing all the problems.

3. I truthfully believe that the troublemakers had better shape up now and start working with the company and other employees instead of fighting the company at every turn and trying to stick a knife in their back at every opportunity. We don’t need people like that and I don’t believe the Company can tolerate it any longer.

The General Counsel adduced the testimony of seven employees as to this speech.⁷ Each of these witnesses testified in generalized and conclusionary terms as to small segments of the speech for the most part in accord with the prepared text. Their testimony was rendered with a high degree of uncertainty except for the recollection of four of them that Alexander stated that the troublemakers would be eliminated. Of these four witnesses, three added that Alexander stated further that the troublemakers would be eliminated “one by one.” Because of the witnesses’ certainty in this regard, and the lack of any palpable bias, I credit their testimony that Alexander did append his remarks by telling the employees that the troublemakers would be eliminated one by one.⁸ In any event, Alexander’s admitted statement that Respondent did not need the troublemakers and would no longer tolerate their conduct amounted to a clear pronouncement that Respondent was determined to take action to remove them from employment.

The General Counsel’s witnesses also rendered some minor variations of the speech such as references to DESC, the Union, and the NLRB, which I do not credit for the aforesaid reasons. However, the admitted version of the speech within the context of prior employee notices clearly implied that Respondent viewed with hostility troublemakers, i.e., employees who complained to outside agencies such as OSHA or sought the assistance of the Union inasmuch as Respondent explicitly alluded to the OSHA complainer as a troublemaker in the January memo, and to the Union in the April notice as an entity that stirs up trouble.⁹

On July 31, 1980, Respondent conducted an employee meeting in its warehouse exclusively with those employees who had previously been invited pursuant to written hand-delivered invitations. Those employees who had been admitted to the meeting on presentation of their written invitation were served soft drinks, and, after a short wait, were addressed by Respondent’s president, Mark Stone. A prepared speech was delivered by Stone, the text of which was adduced into evidence. In addition

⁷ Fleming with great uncertainty placed the meeting in March 1980. As no other witness testified to any such similar meeting in March, and as Fleming was admittedly uncertain, I credit Alexander that the June 18 meeting had not been rendered in an earlier version in March.

⁸ Alexander and Burdzinski clearly were not disinterested witnesses. Alexander, moreover, resurrected a visible emotional agitation on the witness stand whenever he alluded to employees who resorted to OSHA or whenever he referred to “troublemakers.”

⁹ On January 31, 1980, the Union filed the unfair labor practice charge against Respondent in Case 9-CA-14838-4.

to laudatory remarks for employees and managers responsible for its business progress. Stone stated:

But as I paint this rosy picture I cannot forget that a handful of troublemakers here at Gayston has been attempting to interfere with our Company success. For reasons which I do not understand these employees seem intent on hurting our Company through false statements and disruption. You can be sure that these people will not harm our Company or our employees and their job security. I will stick to my conviction that Gayston is a family-owned business whose management and employees must work together in harmony.

Thereafter, Stone thanked employees for their hard work and pointed out that, above and beyond the next regularly scheduled merit review set for December, he desired to grant the employees an additional reward, i.e., and across-the-board flat 20-cent-per-hour general wage increase, effective July 28, 1980. Burdzinski testified that Stone did not deviate from the text of the prepared speech. Several employees and former employees testified that Stone did indeed add a significant statement. These witnesses have little to gain by testifying adversely to their employer or former employer except to incur the wrath of their employer or to jeopardize a possible job reference source. Those employees who testified were not shown to have been possessed of any bias.¹⁰ I find them more credible than Alexander or Burdzinski who suggested that he was personally responsible for Stone's comments, and therefore obviously interested in the exoneration of Stone.¹¹ Moreover, for no proffered reason, Stone did not testify in this proceeding. I can only infer that his testimony would be adverse to Respondent. I credit the testimony of the General Counsel's witnesses that during his speech Stone, within the context of his reference to troublemakers, alluded to employees who resorted to OSHA and further stated that troublemakers would be eliminated by Respondent, I give no weight to Alexander's testimony in that he did not testify as to what he recalled but rather he merely denied that threat by Stone.

Burdzinski testified that the July 31 meeting was a "joyous occasion" held to celebrate the good success of Respondent. Burdzinski initially testified that he participated in a managerial decision to invite only "good employees," i.e., those employees whom the individual supervisors thereafter decided and ultimately reported to him as "good." Elsewhere he testified that the "primary concern" was to invite employees who were doing a good job and who had good records, and that at a managerial meeting "a group of us worked on compiling this

list of invitees," i.e., Stone and factory managers, Don Penny, Al Twehues, Les Sontarre, and Will Dewey. He explained that he consulted those managers directly because he felt that they knew all employees. Accordingly, under this second version individual supervisors were not consulted as to who was a good employee.¹² The criteria applied by these managers, according to Burdzinski, was the individual's ability to produce the desired quality and quantity of work exclusive of attitude and attendance which were not to be considered. Counsel for the General Counsel's inquiry of Burdzinski as to whether production readings were taken from employees' machines was met with an evasive discourse by Burdzinski as to the inability to measure productivity for certain classes of employees, i.e., janitors. I infer from his obscure and evasive testimony that no recourse to production or personnel records was made by the factory managers as they sat and made notes on yellow pads at a high-level managerial meeting with Stone and Burdzinski.

Contrary to Burdzinski's assertion that attitude was not an indicator of a good employee, at least one employee, Union Steward Eunice Fleming who had received a favorable job review for that year, was not invited despite the fact that the only negative reference in her personnel file was that she demonstrated a "poor attitude toward the company" coupled with a demonstrated good attitude toward coworkers and an absence of any problem as to "cooperation." Her personnel file did not explain the meaning of "poor attitude."

The General Counsel contends that union activists constituted a disproportionate share of the noninvitees. Of a work complement of about 150 to 200 employees at the time of the meeting, about 55 to 60 were union members.¹³ The exact number and identity of noninvitees is clouded. Neither Burdzinski, who in many areas relative to Respondent's defense testified with detailed and precise recollection, nor his assistant, Nancy Evert, who participated in the invitation distribution, could recall the number or identity of employees not invited. Burdzinski reluctantly placed the figure as less than 27. Upon persistent examination Burdzinski recalled the name of one person who had not been invited, i.e., Union Steward Ruth Stevens. Evert testified that she did not recall the actual list nor what became of it but could only obscurely recall that Burdzinski in some fashion gave instructions as to whom to invite. On August 7, 1981, Evert composed lists of employees who attended and who did not attend, based on source documents such as an attendance check list which she destroyed on or after August 7, 1981. This list of nonattendeess reflects 26 names. But nonattendeess are, of course, not necessarily noninvitees. According to the uncertain testimony of em-

¹⁰ Particularly convincing was Thelma Clark, an employee of 6 years' tenure and a nonunion member who appeared to have no trace of a bias and as a nonunion adherent was not susceptible to imagining threats as Respondent argues did the union adherents.

¹¹ Burdzinski testified regarding Stone's speech, "Right, he read it. I had a copy too. I followed along as he read it. He'd gone over this speech with me before he ever read it. Before this speech had been given, That's customary. He would never, ever give a speech without showing it to me first." Burdzinski testified to a similar practice with respect to Alexander's speech.

¹² Supervisor Larry "Fuzzy" Ray admitted that he was not consulted as to who was a good employee, despite the fact that his machines retain production records, and that he is directly aware of the abilities of employees under his supervision. Similarly Supervisor Gary Pfeiffer admitted that he was not consulted prior to the July meeting and that he prepared no reports of employee qualities or productivity nor was he asked to do so.

¹³ At the time of the hearing herein, about 19 to 20 employees were union members.

ployee Thelma Clark, she observed all except 12 union members attended the meeting of employees of both buildings. However, no foundation was laid for her competency to testify in this regard, i.e., it is not established that she personally knew or was able to identify all 150-200 employees employed in two buildings by sight or otherwise, or that she took a count of attendance. Moreover, she testified that she had never been a union member. Finally, there is no basis for her to have known whether any of those not attending had received invitations. Testimonial evidence establishes that the following persons did not receive an invitation:

- (1) Linda Collins, union committee person.
- (2) Ruth Stevens, union steward.
- (3) Linda Olinger, a union member who at one time in 1978 or 1979 was accused by manager Twehues but cleared by Alexander as having complained to OSHA and who prior to the summer of 1980 was interviewed by OSHA agents in the plant along with other employees.
- (4) Eunice Fleming, shop steward.
- (5) Sondra Johnson, chief steward.
- (6) Merle Horton, member of the union executive board and shop committee.
- (7) Debra Meyers, steward and committee person.
- (8-10) Mae Whitaker, Berry Smith, and Linda Meeker, union members who had engaged in union handbilling with steward Alice Hatcher, Sharon Rawlins and the above-named employees, at the plant, in the morning at the gates, on several occasions, during one occasion of which they were observed by maintenance manager Jerry Fetters [not alleged as a supervisor in the complaint], who made an obscene remark concerning the leaflets.¹⁴

Although the General Counsel appears to have demonstrated that a probability existed that a large portion of those employees not invited to the July 31 meeting were union officers or members who had leafleted the plant, it does not appear whether or not the necessarily concomitant large portion of union members invited to the meeting were inactive. Nor does the evidence reveal that the number of union officers and stewards not invited to the meeting constituted a majority or even a large segment of all the Union's employee officers and stewards. Except for the handbilling activity, the extent of which was not clearly shown to be known by Respondent, and some evidence of grievance activities, the extent of actual union activity of these officers known to Respondent is also unclear. Therefore, I cannot determine whether the union officers, the three leafleters, and union member Olinger were the more active of the union members. Thus, despite Burdzinski's suspect testimony, I cannot find that the General Counsel has established that Respondent excluded employees from the July 31 meeting on the basis of known union activism or other concerted, protected strike activities.

Former employee Mary Thomas testified that sometime during the summer of 1980 Alexander and Burdzinski

held a meeting of employees in the plant cafeteria wherein Alexander told employees that certain unidentified grievances had been filed against Respondent which he felt were groundless and "that they wouldn't get anywhere, and that the company lawyers would see to that." No context was given for this statement, and no corroborative testimony was offered. However, inasmuch as her testimony was not contradicted by Alexander, I credit Thomas.

2. Fall of 1980—Dues checkoff and membership withdrawal

Burdzinski testified: "In approximately the fall of 1980 a number of employees stopped me and said, 'How do we get out of the Union?'" When asked whether he could identify those employees he named one employee—Karen Hall—who purportedly asked him four or five times how to "get out." Burdzinski testified that when this occurred during one of his plant peregrinations he was "kind of taken by surprise" and that he did not know how to answer and accordingly he made copies of the "authorization and assignment statements," and underlined pertinent explanatory portions relative to revocation and sent them only to those persons he believed had made inquiries. It was not established who or how many persons received this data. Burdzinski testified that his relief of putting "the whole thing at rest" was shortlived as "several employees" to whom he had spoken returned and told him that they still did not understand despite their receipt of his mailing, and that he accordingly on or about October 14 mailed the following letter to those same employees who complained that they still did not understand:

As you may recall, the contract between the Company and the Union permits union members to resign from the union after a minimum period of nine months. The authorization is automatically renewed at that time, but is revocable upon twenty (20) days written notice. The notice of revocation must be received by the employer and the union prior to the end of any month.

Accordingly, as a union member, you will have an opportunity to resign from the union if you choose to do so by following the procedure set forth below.

The decision is yours to make. The Company simply wants to be sure you know about, and understand, your rights and privileges. Whether you resign from the union, or whether you remain a member will not make any difference in your wages, benefits, position or treatment by the Company.

If you want to resign from the union:

1. You should date and sign two copies of the enclosed letter addressed to the Company and the union. (Keep the third copy for yourself.)

2. After our membership period of nine months has passed, you should mail the two signed copies, one to the Company, and one to the union, in the enclosed envelopes.

¹⁴ The record is unclear as to whether Union Steward Alice Hatcher was invited, and as to the status of Sharon Rawlins and whether she was invited. Both appeared on Everts' list of nonattendance.

3. Be sure that the letters are sent by registered mail. The contract between the union and the Company requires registered mail for those notices to be effective.

We repeat, the Company is not urging you either to remain a member of the union or to resign from the union. As far as the Company is concerned, that is a matter for each man or woman to decide for himself or herself without pressure from either the Company or the union.

Attached to each letter were three copies of the following prepared statement:

To: Local 768 I.U.E. and Gayston Corporation

Under Article III, Paragraph 3.2 of the contract between the Company and the Union, I am hereby notifying you that I revoke my authorization for deduction by the Company of union dues from my wages and that I hereby resign my membership in the Union.

Also attached to the letter were two envelopes addressed respectively to the Union and Respondent on which the lower left corner was typed "Registered Mail."

Burdzinski testified that some of the employees who received the second mailing told him that they still did not understand. Again he did not identify nor did he specify the number of employees who received the second mailing. He testified that he never initiated a meeting with any employee who had expressed a desire to withdraw from the Union, but that "several employees at various times" approached him, and that he met with these employees individually and in groups. These employees were not identified nor did Burdzinski recount those conversations.

Linda Olinger testified that she received both mailings but that she had made no prior requests for information relative to dues-checkoff revocation or union membership withdrawal. Burdzinski testified that he sent the first mailing to those employees whom he "believed" had requested information but he did not explicitly contradict Olinger nor did he allude to any particular conversation with her. I therefore credit Olinger.

Sometime in October, between October 12 and 13, employee Mary Thomas engaged in a conversation in building 1, near the truck entrance, during worktime on the second shift with Supervisor Larry "Fuzzy" Ray. Thomas testified that Ray approached her, told her that he thought the Union was not "doing anything" for the employees but was just taking their money, and asked her what she thought of the Union. According to Thomas, she responded that it was nice to know that there was someone "backing up" the employee, but that Ray thereupon told her that Respondent was in the process of sending out form letters to each employee that must be filled out, certified, and sent to Respondent and the Union for the purpose of withdrawing from the Union. Ray then asked whether she had received these documents and she answered negatively. He then told her to report to him whether or not she received these

papers thereafter. At that time Thomas' coworker, Theresa Long, was on sick leave from October 12 to about the first week in November. Thomas testified that Ray asked her if she knew "anything what Theresa Long was going to do," but that she responded that she had not talked to Long. Ray then told her that he knew that there were several union members, whom he did not identify, who were planning to withdraw from union membership. On another occasion he told her that Dimples Mayberry and the janitor intended to drop out of the Union.

Thomas testified that she had several more conversations with Ray thereafter at work and that, during the full week following the first conversation, "it was a constant discussion between us—day, evening, day in, day out, wanting to know whether I received my papers for the [union withdrawal]." She testified that Ray told her that Respondent's president, Mark Stone, would personally thank her if she withdrew her union membership. However, she did not narrate any of the details of these conversations nor did she testify as to what responses she gave Ray. She only added that, during these discussions, Ray mentioned "a couple of names."¹⁵ On some date in October, according to Thomas, Ray told her that he would "get with personnel" in order that she would receive her union withdrawal forms.

Thomas testified that on October 16 or 17 after the last break on her shift after 10 p.m., as she was emerging from the washroom in the rear of the building, Ray approached her and asked her whether she thought that it would be too late in the day to telephone Long. She thought not. He then, according to her, directed and accompanied her to Manager Penny's office to a phone on the desk and instructed her to telephone Long. Upon getting Long on the phone, she handed the phone back to Ray and immediately returned to her job.

Long testified that she had received telephone calls from Thomas wherein Thomas had narrated conversations she had with Ray concerning withdrawal from the Union, and that on one occasion thereafter Thomas telephoned her and put Ray on the line, and that thereafter Ray and she engaged in some bantering regarding her injury but then Ray asked her whether she had received some "papers" from Respondent. She replied that she had.¹⁶ According to Long, Ray asked her if she intended to withdraw from the Union and she responded that she was "thinking about it" and that she explicitly agreed with his observation that she could use the \$12.79 monthly dues as she had three children. At that point Ray told her that "Mary [Thomas] was going to get out," and she responded that she would do "whatever

¹⁵ On cross-examination she retracted her direct testimony that Ray told her Stone would make it "worthwhile," as she admitted that this was her interpretation of what he said. She testified as above after she was confronted with her pretrial affidavit.

¹⁶ Long testified that she received the October letter to which the withdrawal forms and envelopes were attached, despite the fact that she did not receive the first mailing, thus contradicting Burdzinski who testified that the second mailing was limited exclusively to those employees who had received the first mailing and who had later complained of the lack of understanding thereof. As Burdzinski did not rebut Long's testimony nor allude to a specific conversation with her, I credit her testimony in this regard.

Mary does," and would talk to Mary. In response to his question, she told him she would return to work the following Monday.

Thomas testified that later in the evening after the telephone incident, Ray came to her at her work station and told her that Long said that she would do whatever Thomas would do and that she needed the dues money for her children.

The following Monday, according to Long, she returned to her job and at or about 4 or 4:30 p.m. Ray approached her and asked her whether she intended to withdraw from the Union, to which she responded that she did not know. Thereupon Ray told her that the withdrawal requests had to be "certified." In answer to her questions, Ray said that this was to be done at the post office at a probable cost of "seven or eight dollars," to which she commented to him that she could not afford it and that he then walked away.¹⁷ However, during this conversation, according to Long, Ray told her that if Respondent ordered him to "put her out the door," that he was helpless, and the Union could do "nothing about it." Long testified to two occasions in the past where Ray had assisted her and had prevented her discharge.

Thomas testified that, sometime "around" October 10, Ray made an appointment for her to meet with Burdzinski in the personnel office. She testified that at 4 p.m. Ray instructed her to turn off her machine and to go and meet with Burdzinski. Ray accompanied her to that meeting. At the meeting Ray told Burdzinski that Thomas had a "problem," that she was interested in dropping out of the Union but had not received her "papers," and that he wanted to be sure that she received them. At that point Burdzinski took some readily available papers from the top of his desk and showed her how to fill them out and explained the need to have them "certified." According to Thomas, Burdzinski then asked Ray whether there was any other night-shift employee that "needed to talk with him or discuss anything with him," but Ray answered that he was unaware of anyone else. Ray thereafter escorted Thomas back to her work station.

Thomas testified that she noticed that Ray commenced wearing a large button on which there were figures of yellow stars about the time that he first questioned her about union withdrawal and that as time elapsed the number of stars on that button increased. She testified that during one of their conversations regarding her receipt of the withdrawal forms she questioned him about the button and he responded enigmatically, "the star was in reference to a 3-star general of all assholes," and smiled and said, "think about it."

Ray testified that he had been a supervisor for about 6 years and currently supervised about 23 employees in building 1, second shift, and that in the fall of 1980 employees Jim Vickers and Dimples Mayberry asked him how they could withdraw from union membership, and accordingly he decided to see if he "could be of any help" to Thomas by questioning her as to her union sym-

¹⁷ Long testified that the envelopes sent to her by Respondent were "stamped," but, in light of her testimony regarding postage costs with Ray, whatever was stamped on the envelopes apparently did not cover the cost of registered mail or certified mail.

pathies. He does not contradict nor add to Thomas' version of the interrogation as he could not remember what she said, although he testified that she did not indicate an opinion favorable or unfavorable to the Union. Ray testified that it was his recollection that "it just seemed like the Union was up and [the employees] could either rejoin or sign up again, or what have you." He admitted conversing with Thomas about Long's union sympathies, and also instructing Thomas to telephone Long, and to his interrogating Long as to her support for the Union and her intention as to withdrawing. Thus, neither Thomas nor Long initially solicited such information concerning union membership withdrawal. Ray denied that he told Thomas that Stone told her he would make it worth her while if she withdrew from the Union but he did not explicitly deny any other aspect of her testimony. He could not, however, remember a conversation about the yellow star badge but merely testified that the stars were reflective of production quotas despite the fact that he was given no instructions about the badge nor was there any contest concerning production. As to conversations with Long, Ray only explicitly denied that he ever alluded to the fact that she could be discharged. In light of the more detailed, certain, largely uncontroverted, and corroborated testimony of Long and Thomas, I credit them whenever they are inconsistent with that of Ray who was less detailed in testimony and less certain in demeanor. Ray failed to testify that he had reported to Burdzinski the fact that employees had requested information regarding union membership withdrawal or dues-checkoff revocation. He admitted that Vickers and Mayberry approached him concerning membership withdrawal after Burdzinski had mailed the checkoff and membership withdrawal information.¹⁸

Other than the foregoing incidents, no other evidence was adduced by the General Counsel as to the receipt of Burdzinski's union withdrawal material by an employee who had not sought information from him concerning the subject, despite the testimony of the General Counsel witnesses concerning receipt of these documents, i.e., Long and Katherine Mumpower. Gail Stumpff, a General Counsel witness, testified that she voluntarily approached Burdzinski in his office and that she first told him that she desired to withdraw from the Union and that he provided her with withdrawal materials at her request, but that she received information regarding membership withdrawal in the mail after that meeting. After Stumpff withdrew from the Union in October, President Stone came to her at her work station and thanked her for having "trust in the Company," and explained that he had received a copy of her letter of withdrawal from the Union.

Edna Whitaker, a witness for the General Counsel, testified that, in October 1980, she initiated a conversation with Burdzinski in his office, wherein she presented him with a self-composed, self-initiated withdrawal of union membership and that he offered her as an alternative a

¹⁸ Mayberry was called as a General Counsel witness and testified as to other matters. On cross-examination she testified, in effect, that she withdrew from union membership in October 1980, but she was not questioned about the circumstances.

blank withdrawal form that he had previously prepared. Like Stumpff, she did not testify as to the details of the conversation, nor did she relate exactly what Burdzinski said. She later mailed the withdrawal request several days later. She also testified that, on the day that she approached Burdzinski in his office, several other employees coincidentally also had come into his office "for the same reason." According to Whitaker, she did receive Burdzinski's October mailings, but only "a lot later" after she had mailed an executed union membership withdrawal request. Whitaker testified further that, within a few days after her union withdrawal, Stone came to her at her work station and thanked her for her "decision" and told her he would try not to "let me down."

3. Winter 1980—threats, interrogations, and surveillance

Althia Piercy was first employed by Respondent from January 1978 until her resignation from her group leader position in October 1979. During the Union's initial organization efforts, Piercy disclosed to Foreman Gary Pfeiffer her opinion that "unions were a good thing." On or shortly before September 29, 1980, she applied for reemployment and discussed with Burdzinski the possibilities of returning to her old position or to that of a machine operator. She expressed a preference for the latter position, and in a second conversation with Burdzinski her request for reemployment as a machine operator was granted. In that conversation the mechanics of the reemployment process were discussed. At the end of the meeting, according to Piercy, Burdzinski stated, "Oh yeah, and if you join the Union I'll fire you." Further, according to her testimony, she responded, "Well, if you do I'll—I'll go out there and tell them—I'll tell on you," and Burdzinski retorted, "I'll just deny it." Burdzinski, who had been employed as a personnel director during the Union's initial organizing effort and who actively participated in both collective-bargaining negotiations, denied that there had been any discussion of the Union during Piercy's rehire process. He did not recount with any detail the actual substance of the conversation nor did he give his version of what transpired. For reasons set forth more fully hereafter, I found neither witness to have possessed complete candor. I find that Piercy exaggerated her testimony. However, I find that Burdzinski was an evasive, calculating, and unconvincing witness in numerous other areas. Both witnesses have an interest at stake in this proceeding, although Respondent, as we shall discuss below, still held out the prospect of possible reinstatement to Piercy. Both witnesses generally were assertive and forceful in recounting certain events. Piercy's vivid account of the hiring interview was given with a most certain demeanor which was similar to her demeanor demonstrated when testifying to those incidents which were admitted or not denied. Based upon my observation of both witnesses in all their testimony, I found Piercy to have been somewhat more spontaneous and convincing. Although the threat to discharge was a rather stark statement, the conversation occurred within a context of overall Respondent aversion to the Union and although Piercy had made favorable reference to the Union in the past she had never joined it. I credit

Piercy's version of the reemployment interview and discredit Burdzinski's denial of the threat.

During her second period of employment Piercy was again supervised by Gary Pfeiffer who also supervised between 25 and 32 employees in building 2, on the second shift. In October, Pfeiffer engaged Piercy, at that time a nonmember of the Union, in several conversations at her work station where they often chatted briefly. In early October, in one such conversation Piercy testified that Pfeiffer stated that there were not going to be any "people on his shift in the union because Mark Stone is going to get rid of all of them." During that conversation Piercy noticed that Pfeiffer was wearing a badge on which were fixed smiling faces and upon her inquiry, she testified that he and Willie Dewey, who wore a similar badge, had a personal contest to see which building could experience the more union membership withdrawals. She also testified, without foundation, that other employees who had withdrawn from the Union wore similar badges. She also testified that in the same conversation, without context, that Pfeiffer stated that Stone had said that he would "close the place down . . . before he'd let the union people come in. . . ."¹⁹ She then testified that there was "another time" in October, in mid-October, where Pfeiffer again engaged her in conversation and again without context, she testified that Pfeiffer repeated the above Stone closure threat *verbatim*. When additional effort was made in cross-examination to elicit some details of these conversations Piercy appeared confused and explained that because Pfeiffer had talked to her so many times about the Union and about the badge she could not "remember one conversation from the other to be exact." Her testimony that she did not "think" that Pfeiffer alluded to badges as symbols of productivity was hesitant and uncertain. She did not explain the circumstances or substance of other badge conversations. Pfeiffer testified that he did indeed have a conversation with Piercy regarding her question as to a badge that he had worn, but that it was in reference to a badge decorated with stars and he told her that each star represented each occasion when a production goal was achieved. He testified that other employees wore badges adorned with smiling faces or other decorations, but that this occurred as a playful response to employee jibes, i.e., Pfeiffer made such badges for employees who had complained, "where's my badge." He denied telling her that there was any connection between the badges and the Union. He denied the reference to Stone's retaliatory plant closure threat. Pfeiffer did not deny the conversation regarding the prediction that there would soon be no union members left in his department because Stone would get rid of them.

Piercy testified further that in December Pfeiffer approached her at her work station just after the second shift started and told her that he needed a "witness" and that he wanted her to go to the lunchroom and listen and later report to him as to what transpired and what was said by union members. According to her, when she angrily refused he allegedly said that he would prevail

¹⁹ The phrase used by her, "come in," was repeated again in her testimony.

on someone else to do it and said, "Maybe I'll even get a tape recorder." When asked on direct examination as to what further was said, Piercy testified: "Well, everytime we talked about anything he would say that Mark Stone was going to get rid of the troublemakers." She testified in response to further inquiry that yes, he had also said it on this occasion. When asked whether she had any further conversations with Pfeiffer in December she responded, "and what year is this, by the way, that we're talking about?" When reminded of the year by counsel for the General Counsel her apparent confusion and uncertainty cleared somewhat, but not entirely and she testified: "December—Oh Yes—He told me that the union members probably wouldn't get a good Christmas bonus." She could recall no details or context or anything else about the conversation except that it occurred on the second shift at her machine. On cross-examination she testified, "and I remember him telling me that the union members probably wouldn't get—I don't know if he said wouldn't get a—a good Christmas bonus, or wouldn't get one at all. And the other ones would probably get a good Christmas bonus." She testified that in 1980 everyone received the same Christmas bonus. She conceded that in her pretrial affidavits that she had made no reference to either the Christmas bonus or the surveillance request conversation. With respect to the surveillance conversation she testified that she was not certain when it occurred. As to her conversations with Pfeiffer, when pressed to estimate how many times the subject of the Union arose, she testified "5 or 6 times or more." Pfeiffer denied that he had requested Piercy to engage in the above-described surveillance or that he ever told her that Stone would get rid of "troublemakers." He, in effect, denied the threat concerning the Christmas bonus.

In mid-January 1981, a confrontation developed between Pfeiffer and Piercy concerning certain pronoun sentiments she had expressed to other employees. Pfeiffer testified that a couple of people, whom he did not wish to identify, had reported to him that Piercy, while on her own time, at lunch in the lunchroom, had made "some kind of a remark that all of us ought to join the Union or something like that—in that nature." Considering it part of his duties to report employee conversations wherein employees urge others "to do this or that," or where employees gather to discuss "various things," or where they complain jointly or individually of work conditions, Pfeiffer admittedly relayed this information to his superior, Plant Manager Al Twehues. According to Piercy's uncontradicted and therefore credited testimony, she was summoned to Twehues' office where he told her that he had heard that she was disappointed in the low amount of a pay raise given to another employee, Martha Swindler. The merits of that level of raise were discussed and Piercy stated that Swindler had not been treated fairly. Then Twehues told Piercy that someone had reported to him that she had attempted to persuade other employees to join the Union. She denied it. (In fact she had not engaged in that activity and was not at that time a union member.) The conversation terminated when Twehues stated that he thought that Piercy would be honest with him because she had always been

honest in the past.²⁰ After that Twehues' conversation, Piercy angrily confronted Pfeiffer about reporting to Twehues that other employees were saying that she was urging union membership. Pfeiffer admittedly responded, "I just felt it was my job to go to Al and let him know what was going on." A discussion ensued between them as to who may have provided this information to Pfeiffer.

According to Piercy's uncontradicted and credited testimony, the following encounter occurred in late January 1981 and on her shift between 3:50 and 5:30 p.m. Plant Manager Les Sontarre approached Piercy at her machine and said that he wanted to ask her a question and proceeded to ask her, "I heard you were going to join." Piercy asked him the source of his information and Sontarre responded, "Oh, I heard." Piercy testified, in effect, that she told Sontarre that he ought to become more familiar "with a lot of things on the second shift" and then he might not have to worry "about all this, and ask people all this." Sontarre persisted and sought an answer to her question but Piercy responded, "Well, I really haven't thought about it yet." Neither person explicitly referred to the Union. Piercy assumed that was what Sontarre was referring because union membership was the talk of the shop at that time. However, she also testified without contradiction that Pfeiffer kept "bugging" her and asking whether she intended to join the Union. In light of Piercy's past conversation with Twehues and Pfeiffer regarding the lunchroom incident, and Pfeiffer's ongoing interrogations, and in light of the absence of any type of organizational drive extant at the time, I conclude that Sontarre's reference was calculated to have been to union membership.

Piercy testified, and Pfeiffer admitted, that Piercy told Pfeiffer that he would be the first to know when she joined the Union. Piercy testified that she signed a union membership card solicited by employee Linda Collins on February 16, and shortly thereafter kept her promise and informed Pfeiffer near the lunchroom area. When she had, Pfeiffer asked her why she had joined the Union. Piercy testified without contradiction that she did so because that was what she thought she should do and because of the way employees were treated. Pfeiffer testified that he told Piercy in response that he did not think she should have joined the Union because Respondent had reemployed her at her old rate of pay and had been "pretty fair" to her. Thus he clearly implied to her that he considered her union membership as an act of disloyalty and ingratitude and an act which was adverse to Respondent's interests. Piercy, however, not only retained her union membership but on March 10, she succeeded to the position of union steward on the second shift, and assisted in the processing of a grievance filed by employee Dewey Messer.

In most respects Pfeiffer appeared to be a credible witness, i.e., he was spontaneous, responsive, and certain in demeanor. He testified to much that did not advance Respondent's position in this case. Piercy's testimony concerning the Christmas bonus, the badges, and the threats

²⁰ Twehues' conduct was not alleged as violative of the Act.

of plant closure was conclusionary, cryptic, without context, and marked by a demeanor that revealed a high degree of uncertainty. Furthermore, a threat to prevent a union from "coming in" does not make sense and is therefore improbable in light of the incumbency of the Union. I credit Pfeiffer's denials of that conduct. However, with respect to the request to engage in surveillance, I found Piercy to have been more detailed and vivid in her recollection, whereas Pfeiffer, unlike the demeanor demonstrated elsewhere in testimony became visibly disconcerted, hesitant, and uncertain in his denial. I therefore credit Piercy in that regard and conclude that Pfeiffer did attempt to enlist Piercy in surveillance of employees' union activities by eavesdropping and reporting back to him the conversations of union members. Such conduct furthermore is in accord with Pfeiffer's conception of his duties (i.e., the accumulating and reporting of such data to his superiors), his view that union membership is adverse to the interest of Respondent, and in accord with the impression cultivated by Respondent's agents in conversations with Piercy and others that union activities were under surveillance. Finally, I credit Piercy's uncontradicted testimony regarding Pfeiffer's prediction that union members would all be soon removed from his shift as Stone planned to get rid of them, and her uncontradicted testimony concerning the interrogations.

Dewey Messer was employed by Respondent from October 27, 1980, until September 1981 when he quit. During his employment he worked in building 2, on the second shift under Pfeiffer's supervision. Messer joined the Union in February. About 1 week later he had occasion during his shift hours to visit the plant office where he inquired of Pfeiffer whether he could shut down his machine early that night. According to Messer, Pfeiffer, however, said, "I heard about you joining the union," and Messer responded that he had joined to which Pfeiffer retorted that it was a mistake. In response to Messer's query as to why it was a mistake, Pfeiffer responded, "you will find out in the future." Pfeiffer could not recall the substance of the conversation but testified that a conversation did occur, that reference was made to a union, that he thought Messer raised the subject, that it is likely that Pfeiffer gave him an opinion. In light of Pfeiffer's inability to effectively contradict Messer, I credit the more certain and detailed testimony of Messer, a witness not shown to have been possessed of any bias against Respondent.

About 2 weeks before Messer quit, he experienced a second conversation with Pfeiffer regarding the Union. Pfeiffer stood outside the lunchroom reading materials posted on the union bulletin board when Pfeiffer approached him. According to Messer's uncontradicted testimony which I credit, Pfeiffer asked him what he was doing and Messer responded, "nothing." Thereupon Pfeiffer said, "That's about all that's on the bulletin board is nothing." Messer asked what Pfeiffer meant and Pfeiffer responded that Messer would "be finding out pretty soon," and at that point drew his face right next to Messer's face and said that when Messer did eventually find out that Pfeiffer would be the first one to "get in [Messer's] face and laugh about it." Pfeiffer testified that

he could recall only part of the conversation, i.e., that Messer said something concerning the union bulletin board and that he, Pfeiffer, looked at him and said something like "Well, I'll be laughing in your face." He testified:

I can't remember . . . what he said at that time. But at the time it seemed logical for me to make a statement like that. It's more or less a smart answer, in a way. He said something smart to me and I said something smart back to him.

I credit Messer's more detailed, certain testimony.

C. 8(a)(1) Allegations—Conclusions

Vice President Alexander's conduct in the series of meetings of employees on June 18, 1980, and President Stone's conduct in his speech to employees on July 31, 1980, constituted attempts to discourage employees from engaging in union and/or other concerted protected activities by threatening employees who engage in such activities with discharge, and as such violated Section 8(a)(1) of the Act.²¹

Although the evidence is uncontradicted that Alexander at a meeting of employees in summer 1980 stated that certain "grievances" were filed against it which were unjust and would not be successful and the company lawyers would prevail, without more context, I cannot conclude that such conduct tended to amount to a statement that employees' resort to all concerted activities would be futile in any circumstances. I find no violative conduct occurred by that cryptic prediction that Respondent's position would prevail.

Burdzinski's October 14, 1980, letter to union members is alleged to have constituted an unlawful encouragement of employees to withdraw support from the Union. In *Perkins Machine Co.*, 141 NLRB 697 (1963); and *Cyclops Corporation, Tex-Tube Division*, 216 NLRB 857 (1975), it was held that similar types of communications sent to all union members were not violative of the Act. In *Perkins*, the letter set forth an assurance of the freedom from any adverse impact, and in *Cyclops* no such explicit assurance was given but it was found that no threats were implicit. In *Perkins* there was no evidence that the information was requested by employees, and in *Cyclops* only some employees made such request. In both cases the letters requested copies of withdrawal notifications, either because of contractual requirement or because it was explained that it was necessary in order for the cessation of dues collection. In essence, the Board found nothing coercive *per se* in the act of an employer informing employees as to the mechanics of withdrawing dues-checkoff authorization and union membership, within the context of those cases, i.e., a context free of coercive conduct, or conduct by which such communication would assume an imperative invocation.

²¹ The Board holds that employees who complain to governmental agencies, e.g., OSHA, about matters of mutual concern to other employees are engaged in concerted protected activities. *Allen M. Campbell Company General Contractors, Inc.*, 245 NLRB 1002 (1979).

In the present case, the union membership was reduced from about 70 at the time of contract negotiation to about 20 in late summer 1980.²² Respondent's conduct preceding, concurrent with, and subsequent to the October 14 letter consisted of acts of interference with employees' rights to engage in union activity and to maintain union membership. I have already discussed the speeches of Alexander and Stone, and the notices to employees by which conduct alone the employees must necessarily have concluded that Respondent desired their abandoned of concerted protected activities, including union activities.

Shortly before the distribution of Burdzinski's mid-October letters, he had, on rehiring Piercy, threatened her with discharge if she later joined the Union, thus violating Section 8(a)(1) of the Act. In early October 1980, Supervisor Pfeiffer informed Piercy after her reassignment under his supervision that there would soon be no more union members left on his shift because Stone was going to get rid of them. This conduct clearly tended to coerce her with respect to her own decision to join the Union. Although this was not precisely alleged in the complaint, it was part of a conversation fully litigated as to the alleged plant closure threat. Accordingly I find it violative of Section 8(a)(1) of the Act. Such starkly coercive conduct cannot be assumed to have remained a secret with its victims. Rather, it can reasonably be inferred that an impact resulted beyond the immediate object of such conduct.

Against the background described above, it is therefore not surprising that some employees would have asked for information as to union membership withdrawal. Moreover, I find that Respondent's conduct was a causal factor in that aroused interest. Accordingly such requests obtained under such coercive pressure is hardly legitimatizing. In any event, although Burdzinski's obscure testimony as to some vague number of employees who requested information was verified by two General Counsel witnesses, there remains also the unchallenged evidence that some employees received these communications without having asked for it. Furthermore, concurrently with the Burdzinski letters, Respondent, by its supervisor and agent Ray coercively interrogating employees concerning their own and another employee's union sympathies and ordering an employee to assist him in such interrogations, thereby violating Section 8(a)(1) of the Act. Ray, also by telling an employee that he was aware of the identity of employees who were planning to withdraw from the Union, without explaining how he knew this, created a situation whereby the employee must necessarily have inferred that he had engaged in unlawful monitoring of employees' union sympathies, thereby violating Section 8(a)(1) of the Act. Ray's conduct was integral to a persistent effort on his part whereby he encouraged and assisted, if not badgered, employees into renouncing the Union, and into encouraging other employees to withdraw from the Union, thus violating Section 8(a)(1) of the Act. *Rock-Tenn Company*, 238 NLRB 403 (1978). I conclude that within the context of the foregoing conduct by Ray, his oblique reference

²² I.e., as gauged by dues-checkoff authorizations.

to the possibility of discharge to one of the employees who was an object of his unlawful campaign constituted an implied threat of discharge if that employee did not withdraw from the Union, thus constituting another violation of Section 8(a)(1) of the Act. President Stone's conduct whereby he expressed personal gratitude to employees for withdrawing from the Union was not only a clear signal to other employees of Respondent's desire that they also should drop out of the Union, but also a reminder to those to whom he spoke, that they should stay out and thus violated Section 8(a)(1) of the Act.²³

I conclude that the General Counsel had adduced sufficient evidence upon which I must find that Respondent was engaged in a course of conduct of which the distribution of union membership withdrawal forms distributed by Burdzinski on October 14, and his personal assistance in aiding employees in filling out appropriate withdrawal forms, formed integral facets. I find that such course of conduct, despite expressions of neutralizing assurances in the letters, was calculated to cause employees to withdraw their union support and membership, and accordingly I find that Respondent by the aforesaid conduct of Burdzinski violated Section 8(a)(1) of the Act.

Subsequently, Respondent persisted in conduct which clearly interfered with employees' rights by Supervisor Pfeiffer's attempt to induce employee Piercy to eavesdrop and report back to him the conversations of union members in the plant lunchroom;²⁴ by Supervisor Pfeiffer and Manager Sontarre's January 1981 coercive interrogation of Piercy's union membership; by Pfeiffer's mid-January 1981 statement to Piercy that as part of his duties he had reported to his supervisor information concerning her reputed efforts in the cafeteria to solicit support for the Union, without clarifying to her how this information was obtained, thereby created the impression that employees' union activities were under surveillance;²⁵ by Pfeiffer's February interrogation of Piercy as to why she had joined the Union; and by Pfeiffer's coercive February interrogation of employee Messer.²⁶ By each such action of its agents I find that Respondent violated Section 8(a)(1) of the Act, and thereby augmented the context within which employees were to evaluate Burdzinski's October 14 letter.

D. 8(a)(5) and Related 8(a)(1) Allegations

1. July 1980 pay raise — September 1981 bonus

At a general meeting of employees on September 4, 1981, at its facilities, Respondent granted its employees a \$200 cash bonus without having given the Union prior notice and opportunity to bargain.²⁷ The parties stipulat-

²³ Again, I must infer that awareness of such open conduct must necessarily have proliferated among the employees, in a context where union activities were reported by employees to supervisors and where retention of union membership was the topic of discussions among employees.

²⁴ The conduct was not explicitly alleged but was part of the conversations between Piercy and Pfeiffer that were fully litigated.

²⁵ Not alleged in the complaint but fully litigated.

²⁶ I do not find in the ambiguous conversations between Messer and Pfeiffer implied threats of reprisal, albeit they contain expressions of Respondent's agent's contempt and ridicule of union membership.

²⁷ As observed above, in late July 1980 Respondent granted its employees a 20-cent-per-hour general wage increase. That increase was ef-

Continued

ed that in December 1977 a \$10 gift certificate was given to employees as a Christmas bonus, and that in 1978 and 1979, \$50 personal money orders were given in December as a Christmas bonus, that in December 1980 a Christmas bonus of \$75 was given, and that other various gifts were distributed with these bonuses, that the \$200 1981 bonus was not a Christmas bonus, and that no other general bonus was given to all Respondent employees during those years. Burdzinski, however, testified that in addition to the foregoing bonuses, that a variety of bonuses were issued on a variety of occasions without objection by the Union. The misleading nature of this testimony was subsequently quickly exposed. On cross-examination he explained that these other "bonuses" were given to individuals or groups of individuals and thus were not general bonuses. On extended cross-examination he was vague and evasive as to what kinds of groups were given other "bonuses." When pressed for some common trait that would distinguish the employees within a grouping he blithely testified: "They were all employees." He could think of no other characteristic. He could not remember the names of any recipient. When pressed further on cross-examination he revealed that what he testified to on direct examination as "bonuses" were not at all augmentations of money paid to employees in return for work performance, but rather prize money that Respondent donated for company-sponsored games and beer busts totally unrelated to work performance but which were awards for skill or chance.

With respect to the 20 cents 1980 pay raise Burdzinski admitted that it was not discussed with the Union immediately before its institution but he asserted: "We discussed it at contract negotiations at length."²⁸ He testified that the same was true as to the 1980 \$400 bonus. He testified that in regard to the bonuses that Respondent during contract negotiations informed the Union that it intended to continue its practice of granting bonuses and that the Union had agreed. Thus, according to Burdzinski, any agreement with the Union as to the continuation of the historic bonus practice could only have concerned Christmas bonuses, and game prizes and beer bust prizes, and thus there was no past practice of, nor necessarily any agreement concerning, any other general bonus of the kind issued in September 1981. Burdzinski testified that the contract negotiation discussions relative to past bonus practice resulted in article 24 of the contract which states:

24.1 The Company and the Union have had ample opportunity to present for negotiations any subject desired. Each, therefore, clearly and unmistakably waives for the remainder of the term of this Agreement the right to request either party to negotiate on any subject whether or not covered in this Agreement and whether or not mentioned

facted without prior notice and opportunity for bargaining to the employees' bargaining agent, i.e., the Union.

²⁸ Other than the conclusionary testimony, no other details were given as to such discussions. However, since the subsequent pay raise was the result of an *ad hoc* decision, the only thing that could have been discussed was the subject of wage increase, and not the specific raise of July 1980.

during negotiations, except with respect to the negotiations of a new contract under Article XXV.

24.2 This Agreement is complete in writing. It may be amended only by an instrument in writing signed by the Company and appropriate Union representatives. Such an amendment may be effective during the term of this Agreement and may extend the terms of this Agreement. This Agreement does not operate to include, nor does it obligate the Company to continue in effect, any working condition, benefit or past practice which is not covered or contained in this Agreement.

24.3 If either party suggest any amendment to this Agreement, the willingness of the other party to discuss the request, or make any proposal, shall not in any way negate the complete waiver set forth in Section 24.1 of this Article, nor shall the making of any amendment in any way negate Section 24.1.

Burdzinski did not testify that there had been any pre-contract, extra contractual agreement with the Union concerning the issuance of general wage increases, but rather he merely testified that the contract contains a provision concerning the granting of wage increases without notice to the Union. Respondent in its brief cites article 21.7 which states:

... the Company reserves the right to individually review any employee at any time for any reason above and beyond the general merit review.

Clearly, however, that language is directed to individual raises based upon individual reviews of individual employees. It is as in the balance of the contract silent as to general wage increases beyond the single annual merit review of all employees to occur in the fourth quarter of the calendar year whereby each employee is to receive wage increases of from a minimum of 3 percent to a maximum of 15 percent based upon each employee's work performance, attendance, and ability to cooperate with fellow employees and supervisors.²⁹ What occurred in July 1980 was that Respondent granted an across-the-board flat 20-cent-per-hour wage increase above and beyond the annual merit review as a reward to employees as a whole because of Respondent's economic successes. It was not in any sense a raise resulting from reviews of all employees on an individual basis.

2. Burdzinski's September 1981 memorandum

On September 10, 1981, the Union filed an unfair labor practice charge which, *inter alia*, alleged that Respondent violated the Act by unilateral issuance of \$200 bonuses. On September 23, 1981, Burdzinski distributed to the employees a memorandum attached to copies of that charge which stated in part:

²⁹ The contract sets forth in Appendix A specific minimum and maximum wages for the fourth quarter reviews of 1979 (i.e., 1979-80 wage range) and fourth quarter reviews of 1980 (i.e., 1980-81 wage range).

On Thursday, September 10th, 1981, the IUE filed a charge with the National Labor Relations Board protesting the giving away of [the \$200 bonus]. Apparently, the Union did not want our employees to receive that bonus.

3. Conclusions

Section 8(a)(5) and (1) of the Act obliges an employer to notify and consult with the designated exclusive bargaining agent concerning changes in wages, hours, and conditions of employment. *N.L.R.B. v. Benne Katz, etc., d/b/a Williamsburg Steel Products Co.*, 369 U.S. 736 (1962). Furthermore, as the Board has succinctly stated:

It is well established that during the existence of a collective bargaining contract a union has a right to bargain about the implementation of a term and condition of employment, and an employer must bargain about a mandatory subject of bargaining not specifically covered in the contract or unequivocally waived by the Union. [*G.T.E. Automatic Electric Incorporated*, 240 NLRB 297 (1979).]

A union may elect to waive its rights to notice and bargaining by a contractual agreement. *Bancroft Whitney Co., Inc.*, 214 NLRB 57 (1974). A contractual waiver will not lightly be inferred but must be clearly demonstrated by the terms of the collective-bargaining agreement and, under certain circumstances, from the history of negotiations. *Southern Florida, Hotel & Motel Association, et al.*, 245 NLRB 561 (1979); *Hilton Hotel Corporation*, 191 NLRB 283 (1971); or from unequivocal extrinsic evidence bearing upon ambiguous contractual language. *International Union of Operating Engineers, Local Union 18, AFL-CIO (Davis-McGee, Inc.)*, 238 NLRB 652 (1978). Furthermore, contractual language which reserves to the employer the right to make unilateral changes with respect to certain areas will be strictly construed and will not be interpreted to extend to other areas in the absence of specific evidence of such intent. *Southern Florida, Hotel & Motel Association, supra* (see also *Capitol Trucking Inc.*, 246 NLRB 135 (1979)).

However, when the proposed change concerning wages, hours, or conditions of employment encompasses a change or modification of an existing collective-bargaining agreement, a stricter obligation is imposed upon the employer. It is well-settled law that a modification of a clear and unambiguous term of contract of fixed duration, regardless of economic motivation, must be obtained pursuant to a positive affirmation by the employees' bargaining agent, otherwise the requirements of Section 8(d) of the Act are not met and a violation of Section 8(a)(5) results. *C & S Industries, Inc.*, 158 NLRB 454, 456-457 (1966); *Oak Cliff-Golman Baking Company*, 207 NLRB 1063 (1973); *Sun Harbor Manor*, 228 NLRB 945 (1977); *Fairfield Nursing Home*, 228 NLRB 208 (1977); *Airport Limousine Service, Inc.*, 231 NLRB 932 (1977); *Keystone Steel & Wire, Division of Keystone Consolidated Industries, Inc.*, 237 NLRB 763 (1978); *Precision Anodizing & Plating, Inc.*, 244 NLRB 846 (1979); *Struthers Wells Corporation*, 245 NLRB 1170 (1979). Thus, contractual modification cannot be effectuated by merely

providing an opportunity for negotiation to the bargaining agent.

As alleged in the complaint, the Union herein was given no notice nor opportunity to bargain about the 1980 pay raise nor the September 1981 bonus. With respect to the July 31, 1980, wage increase Respondent argues that paragraph 21.7 of the contract constitutes a clear waiver of its bargaining rights. I disagree and conclude that it does not even constitute an arguable waiver of bargaining rights concerning extra contractual general wage increases. With respect to the 1981 bonus, Respondent argues that during the contract negotiations prior to the 1979 contract, discussions of bonuses occurred and that the Union had agreed to a continuation of bonuses. I have concluded that the Union would have agreed at most to the continuation of past practices, i.e., Christmas bonuses and donation of money for game and beer bust prizes, and could not have agreed to the type of unprecedented bonus granted in September 1981 because it could not have agreed to the continuation of something not yet in existence. Respondent argues that the following language contained in article 24 constitutes an embodiment of an agreement between Respondent and the Union that Respondent would be able to unilaterally grant bonuses:

This Agreement does not operate to include, nor does it obligate the Company to continue in effect, any working conditions, benefit or past practice which is covered or contained in this Agreement.

As Respondent states in its brief, that very language, however, "is such as to protect the Company should it desire not to continue giving bonuses." But the only real bonuses historically given by Respondent had been Christmas bonuses of significantly lesser amounts. The September 1979 general bonus was unprecedented as to kind and amount. I find no clear waiver contained in the contract whereby the Union waives bargaining rights concerning the issuance or amount of a new kind of bonus. Respondent does not argue, and I do not find that any other language in article 24, i.e., the zipper clause constitutes a waiver of bargaining rights inasmuch as there is no evidence that the particular type of bonus and wage increases involved in the unilateral action was fully discussed, nor even proposed, nor that the Union clearly waived its interest regarding that particular type of wage increase and that particular type of bonus. *G.T.E. Automatic Electric Incorporated, supra*; *Angelus Block Co., Inc.*, 250 NLRB 868, 877 (1980). Accordingly I find that Respondent violated Section 8(a)(5) of the Act in bypassing the employees' collective bargaining and unilaterally granting the July 31, 1980, bonus. I further conclude that the general pay raise of 1980 modified the wage rates set forth in the collective-bargaining agreement and as such constituted a midterm modification of the contract without the express acquiescence of the Union, and therefore constituted a breach of Respondent's obligations under Section 8(d) of the Act, and violated Section 8(a)(5) of the Act as conduct in derogation of the contract as alleged in the complaint.

With respect to the September 23, 1981, memorandum to employees, the General Counsel alleges that by such conduct Respondent sought to create the impression that the Union was opposed to the granting of the bonus, thereby undermining the Union's position as bargaining representative. Respondent asserts that the memorandum "merely sets forth the [Respondent's] legal position with respect to the bonus is protected speech." Certainly the notice on its face constitutes an attempt to erode employees' support for the Union by informing the employees that the Union is adverse to the employees' own economic interests. The memorandum constitutes a gross distortion of the Union's position. The Union's charge, as Respondent, having had recourse to experienced legal counsel, ought well realize, is not premised on the fact that employees received a bonus. Rather, it is premised upon the manner in which that bonus was effectuated, i.e., in a manner to unlawfully erode the bargaining position of the Union by depriving the Union of an opportunity to assert its bargaining rights guaranteed under the law whereby it might have negotiated for greater benefits or different kinds of benefits. Furthermore, as the General Counsel correctly argues, that memorandum implies that if the Union's position with respect to the unfair labor practice charge succeeds, that the net result would be a rescission of the bonus. Such rescission is clearly contrary to the Board's virtually universal policy to refuse to order a withdrawal of benefits unilaterally bestowed albeit in violation of the Act. Accordingly, the statement constitutes a threat by Respondent to rescind the bonus if the Union succeeds in the prosecution of the unfair labor practice charge. Cf. *Southside Electric Cooperative, Inc.*, 243 NLRB 390, 399 (1979). Clearly a withdrawal of such benefits would only enhance the coercive effect of Respondent's conduct. Accordingly, I reject Respondent's defense and conclude that by Burdzinski's patently coercive memorandum of September 23, 1981, Respondent violated Section 8(a)(1) of the Act.³⁰

E. 8(a)(3) Allegations

Findings of Facts and Conclusions of Law

1. Discrimination against Piercy

Upon her return to employment in October 1980, Piercy was assigned as a 4-D plate machine operator which utilized what is characterized as "soluble" oil. In March, Piercy requested Pfeiffer to assign her to the 4-D cup machine which she had operated at some time in the past. Pfeiffer promised to return her to the 4-D cup machine when he could. Several weeks later he granted her request. At some point since she last worked on 4-D cup machines, Respondent had commenced using 41-D oil, i.e., recycled oil to which solvent and chemical agents were added. Although Piercy had operated the 4-D cup machine in the past without severe problems and had experienced no difficulties in operating the 4-D plate machine, she soon developed a rash on her arm. On or shortly before March 20, she complained to Pfeiffer that

the rash had become acutely painful. Manager Twehues approached her at her machine and suggested she be examined by a physician. On March 20, she was examined by her physician, Dr. Priest, who prepared a form, "disability certificate" which Piercy presented to Respondent, and which stated she was capable of performing "light" work and that she was "to stay out of contact with 41-D oil altogether [and] recheck in 2 weeks." Piercy testified, without contradiction, that when she presented that statement to Pfeiffer, he responded that there would be no problem "at all" and then he assigned her to operate a machine that utilized no oil at all. She operated that machine on that day, Friday, and the Monday thereafter. On Tuesday, he asked her how her arm was. She replied that it was getting well. However, contrary to Priest's instructions, Pfeiffer then assigned her to a machine using 41-D oil which she operated from Tuesday until Friday. After 1-1/2 hours of work on Friday she became nauseous from the oil fumes and could not work the balance of the day.³¹

According to Piercy, on Monday, March 30, Piercy was called to Burdzinski's office and told by him that she would not be allowed to work on any machine utilizing oil. When asked why she could not trade machines so she could work with soluble oil, Burdzinski responded that even if her request were granted there would still be no guarantee that she would not be in contact with 41-D oil. He did not explain. After that conversation, according to Piercy's uncontradicted and credible testimony, she spoke individually to both Twehues and Pfeiffer and asked them why she could not trade with other employees for an oil soluble machine. Pfeiffer responded he could not tell her anything, and Twehues told her that could not put her on another machine because, "Bud said he was going to do it his way." As of Monday, March 30, Respondent's personnel file memorandum for Piercy, signed, *inter alia*, by Burdzinski, reflects that she was placed on an indefinite leave of absence.

On April 28, Dr. Priest filled out another form certificate for Piercy which she presented to Burdzinski that day. It stated that she was able to return to "regular" duty on Wednesday, April 29. Burdzinski told her, according to her uncontradicted testimony, that he did not understand that statement and that he wanted to obtain more information from Dr. Priest and that he would not permit her to work. He gave her no other explanation.

Burdzinski testified that he did not reinstate Piercy upon receipt of the April 28 certification because he "felt that it was inconsistent with other messages" that he had received from Dr. Priest. Counsel for Respondent elicited the following testimony from Burdzinski, who normally loquacious and assertive witness, appeared unusually hesitant and unassured at this point:

³¹ Burdzinski's testimony that Piercy was put on medical leave of absence upon the receipt of the March 20 note is starkly contradicted by Respondent's own personnel file data. Pfeiffer did not testify in detail as to the events after March 20, except to say that after Piercy returned to work Burdzinski and Twehues "more or less took over because she came back with a doctors excuse," and that at a later time she unsuccessfully tried to utilize a protective glove. I credit Piercy's testimony as to the events immediately after March 20.

³⁰ That conduct was not alleged nor argued to be violative of Sec. 8(a)(5) of the Act, and since an additional finding of 8(a)(5) conduct would not add significantly to the remedy, I make no such finding.

Q. Inconsistent in what way?

A. I thought that this statement was not in keeping with what he had been saying about her condition.

Q. In what way?

A. Well, that she should not work in this oil and should not work in this oil on a permanent basis and that was an unchanging circumstance. This note followed notes that said that.

Q. In other words you have received notes in the past saying that she had a permanent restriction and this indicates there's no permanent restriction?

A. That's right.³²

On cross-examination Burdzinski testified that Dr. Priest's notes were confusing, i.e., some referred to 41-D oil and others just referred to "oil." Burdzinski gave no dates for these other "notes" nor explained what precipitated those messages.

Piercy testified that the next event that occurred was that on a later undisclosed date Burdzinski communicated with Dr. Priest and asked for more information, and that as a consequence a letter was mailed to Respondent from Dr. Priest on May 26, a copy of which was sent to Piercy. The letter stated:

Mrs. Piercy was seen on March 20, 1981 stating that she had a rash on her left hand and right arm from working around oil and that it had been present for approximately one month. My impression was that she suffered from a contact dermatitis secondary to the use of this oil.

At this juncture, her condition has improved immeasurably and I feel that she could be released for full duties on June 1, 1981 with no restrictions.

If the rash should recur, an evaluation and opinion of a dermatologist should be effected.

Piercy testified without contradiction that after the receipt of that letter by Respondent, she contacted Burdzinski several times and requested reinstatement but that he refused and claimed that he required more time to evaluate that brief letter.

On June 8, at a meeting between Piercy, Burdzinski, and Union President Red Farrell, Burdzinski offered reinstatement doing "the same thing." Piercy responded "fine." She was immediately sent to work. However, her regular 4-D cup machine did not have parts to run. She therefore ran a clutch shell machine which used 41-D oil but which did not spray oil onto her arms as did her regular 4-D cup, six-spindle machine. Her hands did come into contact with 41-D oil. During late June or early July, Piercy was reassigned to her regular 4-D cup machine. After a few days her arms began to experience a burning rash. She reported to Pfeiffer who sent her to a hospital. Before she left she requested a transfer to an oil soluble machine. He told her he could not grant her request. He did not explain. She thereafter was examined

³² Despite the fact that Burdzinski maintained detailed file memoranda and personnel records, no effort was made by Respondent to corroborate Burdzinski by adducing copies of these notes. No objection, however, was raised as to this testimony, nor was there any demand for production of these notes. Dr. Priest did not testify.

by a physician, and received a medical statement which proscribed her contact with the "chemical" for 4 or 5 days.

The next day Twehues, Pfeiffer, Chief Steward Eunice Fleming, and Burdzinski met and discussed Piercy's situation, after Twehues told Piercy she should not clock in. According to Piercy's uncontradicted testimony, she presented Burdzinski with the June 8 medical statement and asked Burdzinski why she could not trade jobs with another employee, so that she could work with soluble oil but that Burdzinski responded that he could not in any event guarantee that she could be kept out of contact with 41-D oil, and that he required medical answers to his questions. Fleming asked the nature of the medical questions and asked why Piercy could not trade jobs with an operator in building 1.³³ According to Fleming's uncontradicted testimony, Burdzinski remained silent. Fleming insisted upon an answer, but Burdzinski would say no more but instead insisted that Piercy be put on a leave of absence until further notice. During the conversation Fleming insisted to Burdzinski that Respondent had in the past made arrangements to accommodate injured employees but that Burdzinski denied the practice.³⁴ Fleming gave him the name of an employee who had been accommodated and told him to check it (i.e., an employee with a broken finger whom the janitor assisted).

In July, Piercy and Mumpower approached Twehues and offered an exchange of jobs between them but were refused. Thereafter, on dates unspecified, Piercy telephoned Burdzinski several times and requested reinstatement. Burdzinski, according to her uncontradicted testimony, insisted on a medical release. Thereafter, on an unknown date, Piercy submitted to Respondent a medical statement which indicated, according to her uncontradicted testimony, that she could be reinstated on condition that she wore a protective covering on her arms. Piercy therefore purchased a protective arm's-length glove and so informed Burdzinski in a phone call. Burdzinski told her that if she wanted to speed her return that she should talk to her doctor inasmuch as Burdzinski had written him a letter and was waiting for a response. Piercy then contacted her doctor who told her that Burdzinski wanted to know the meaning of the word "gauntlet," and that the doctor explained to him what it meant. Thereafter on August 3, Piercy was reinstated to work on condition that she wear that glove at all times in the shop regardless of machine or type of oil used.

³³ Fleming corroborated Piercy. Fleming testified that she protested the unfairness of the refusal to permit an exchange of jobs, particularly when she told Burdzinski of the name of the employee who volunteered to trade jobs with Piercy in building 1, and also named other volunteers. Union Committeeperson Linda Collins testified without contradiction that during Piercy's absence non-41-D oil-using machines were operated by other employees and that between March and July 1981 she and employee Bernice Hood approached Twehues and offered a trade of machine between Hood and Piercy and that Twehues refused and said that Burdzinski wanted to "handle it his way." Collins also informed Twehues of other volunteers willing to trade machines with Piercy.

³⁴ Burdzinski did not contradict Fleming. I credit her. In light of Burdzinski's subsequent testimony as to accommodation, I conclude that he falsely stated to her Respondent's policy and practice as to such lack of accommodation.

Thereafter the glove quickly deteriorated and no effective substitute could be found by her. Piercy testified, without contradiction, that on August 13, pursuant to her request, Pfeiffer permitted her to work on an oil soluble using machine by trading with other employees and that was the only time she had not been assigned to a 41-D oil using machine between August 3 and 14. On August 14, Piercy was informed by Burdzinski that she was being put on a leave of absence. Piercy thereafter attempted without success to locate a proper effective glove. In September or October, Piercy telephoned Burdzinski and asked when she could return to work and was told that he would require a medical release. She asked why she could not trade machines with Mumpower, as had been permitted on August 13. He merely told her that she could not, but that he would find a job for her and would contact her. She had received no contact thereafter. Piercy has subsequently been advised by the Union that Respondent desired her to be examined by a dermatologist. She has had no such examination, having been treated by her regular physician, Dr. Priest.

Burdzinski testified that he placed Piercy on a leave of absence, where she remains, because he is not certain what chemical is causing her skin reaction, i.e., according to his conversation with Dr. Priest, no scientific tests have been performed and Priest's conclusions are based upon Piercy's statements and that Respondent is currently attempting to obtain a dermatologist's examination. Burdzinski admitted that Respondent's policy and practice is to accommodate, wherever possible, employees who have medical restrictions and limitations, but that if the employee cannot be accommodated, the employee is separated.³⁶ Examples of past terminations of employees with health problems cited by Burdzinski, however, involved situations where employees were totally debilitated by contact with any type of oil, or where they were allergic or adversely affected by the total work environment. Burdzinski testified that he was unable to conclude that Piercy's problems were related solely to contact with 41-D oil, and he questioned Dr. Priest's apparent conclusions as to 41-D oil as the cause of Piercy's skin reactions in light of what he termed were Priest's conflicting statements to him, i.e., one note which stated that Piercy should stay out of oil without clarification or type, another note that referred only to 41-D oil, a note that said she had improved, and a communication that she had a permanent problem.

Burdzinski testified that he directed that Piercy be allowed to work as any other operator. Burdzinski denied any "personal" knowledge that Pfeiffer, after March 20, had assigned Piercy to 41-D oil using machines almost exclusively, and any "personal" knowledge that she ever had worked on soluble oil machines. However, Pfeiffer's testimony indicates that Burdzinski was in direct control of Piercy's situation, and his and Twehues' refusal to permit an exchange of jobs necessitates the conclusion that Burdzinski must have been personally aware of and responsible for the nature of Piercy's assignments, particularly in view of his awareness of a medical problem.

³⁶ The General Counsel adduced evidence of a variety of situations wherein Respondent accommodated the partial incapacities of employees. In light of Burdzinski's admission there is no need to recite them herein.

Burdzinski admitted that although all machines are capable of using both types of oil, that normally Respondent operates certain machines which use soluble oil exclusively and certain machines which use 41-D oil exclusively. Burdzinski testified that he had no basis upon which to conclude that Piercy had improved when assigned to soluble oil using machines.³⁶ Accordingly he never instructed that she be assigned only to a soluble oil using machine. No other evidence was adduced by Respondent to demonstrate why Piercy's and the Union's request for approval of a voluntary exchange of jobs which would have resulted in her transfer to a non-41-D oil machine was not granted except for Burdzinski's testimony that Respondent does not permit employees to choose their own work assignments. However, it is admitted that Piercy's initial transfer request to the 4-D cup machine was granted for no other reason than she asked for it.³⁷

From the foregoing facts I conclude that Piercy suffered from a rash whenever she operated a 4-D cup machine which utilized the recycled 41-D oil and that she experienced relief when not working on such a machine. I conclude that Pfeiffer was aware of her reaction whenever he assigned her to a 4-D cup machine. I conclude that as of March 20, he was aware of a medical statement which instructed against her assigned to contact with 41-D oil, but that after following that prescription for several days and after observing an improvement he nevertheless assigned her again to a 41-D oil machine only to see her debilitation ensue. As explained above, I conclude that Burdzinski caused these assignments and was aware of the reaction, and that he put Piercy on a leave of absence on March 30, after he countermanded Pfeiffer's original compliance with Dr. Priest's orders and after he obtained evidence that Piercy could not work with the 4-D cup machine. I conclude that Respondent failed to abide by its own admitted policy and practice by refusing to accommodate Piercy's request to transfer to an oil soluble machine. I conclude that Respondent has failed to demonstrate any justifiable business reason for its departure from its own plant policy and practice. I find Burdzinski's testimony concerning the basis for his rejection of Dr. Priest's April 28 medical release to be not credible inasmuch as his vague, unconvincing testimony as to other inconsistent notes was not corroborated by evidence within the control of Respondent, and was in any event improbable as there was no occasion between March 20 and April 28 for Dr. Priest to have forwarded any other "note," releases, statements, etc., to Respondent, and certainly no basis for Dr. Priest to have at that early date issued any prognosis of a permanent nature, as he had not even done at any later point. Indeed, those notes adduced into evidence reveal a tendency to tentative conclusions. I find that Burdzinski's explanation that there was a danger that Piercy would

³⁶ In light of Pfeiffer's testimony regarding Burdzinski's control of the situation, I find this testimony to be not credible.

³⁷ One of the individual employees who offered to trade job assignments to accommodate Piercy was the self same employee who had been assigned Piercy's original oil soluble machine from which she was transferred in March 1981.

have been exposed to 41-D oil in any event is inexplicable and contrary not only to his own testimony that certain machines normally do not use 41-D oil, but also contrary to Piercy's palpable improvement known to and observed by Respondent when she was not assigned to 41-D oil. Respondent argues that it was justified in not assigning Piercy to any machinery which utilized oil because it was acting in the interests of her health and to protect itself from liability. However, if that were Respondent's motivation, it fails to explain why, when it did permit her to work upon notification of a problem, it assigned her almost exclusively to machines using that type of recycled oil of which she complained, but steadfastly, for no cogent proffered reason, refused to assign her on a regular basis to one of several machines which used nonrecycled oil and whose operators offered to trade with Piercy. Respondent asserts that it is trying to arrange for an examination of Piercy by a dermatologist, but the only reference to a dermatologist appears to have arisen long after the unfair labor practice was filed. Piercy was only advised obliquely by the Union before the second session of this hearing that Respondent was attempting to consult a dermatologist. Piercy was never told by Burdzinski that Respondent desired her to consult a specialist. Rather, Burdzinski deferred action pending his lengthy evaluations of simply phrased messages from Dr. Priest, and the doctor's simple suggestion that she utilize a protective glove.

I find that Respondent deviated from its past practice by denying Piercy's request for transfer from an assignment to a machine which caused her to suffer a palpable adverse skin reaction to a machine which she demonstrated could be operated with no adverse reaction for no justifiable reason. This disparate treatment of Piercy is unexplainable except of the fact that Piercy was known by Respondent to have joined the Union and to have engaged in union activity, conduct to which Respondent was clearly hostile. Accordingly, I conclude that Respondent's assignment of the 4-D cup machine to Piercy after March 20 constituted an assignment of what was to her onerous work calculated to and which did result in a forced leave of absence from March 30, 1981, until June 8, 1981, and from early July to August 3 and from August 14 and thereafter because of her membership in and activities on behalf of the Union and thus in violation of Section 8(a)(1) and (3) of the Act.

2. Discrimination against Debra Gilmore

Debra Gilmore was hired by Respondent in May 1973. In 1977, her active employment was interrupted by an extended pregnancy situation which resulted in a work hiatus from December 1977 until August 1978. She ultimately became an inspector. Her work record reveals only a single minor reprimand. In August 1979, she was required to take a leave of absence in order to undergo medical surgery. Her scheduled date of return was, with Burdzinski's approval, extended twice.³⁸ Gilmore was

³⁸ I credit Gilmore as to her testimony in this regard. She was not explicitly contradicted by Burdzinski. Burdzinski testified that all personnel actions in this regard were documented. Gilmore testified as to at least two extensions but Respondent only adduced into evidence a separation form dated August 30, 1979, which indicates an expected return date of

first scheduled to return in October 1979. She visited the plant twice in October and spoke individually with Burdzinski, her supervisor, Jack Mulhern, and Union Steward Sondra Johnson on separate occasions. Johnson was an inspector and coworker with whom she often spoke. According to Gilmore, she merely discussed generalities with her. According to Gilmore, in mid or late October she visited Burdzinski, presented a medical statement to him, and discussed her return. He told her in regard to an extension of her return date, "Fine, just take your time and get well and come back." She was then scheduled to return to work on November 19, but she suffered a medical relapse and could not return as promised and was granted an extension to return at the end of November.

On or about November 5, Gilmore visited the plant and talked to Burdzinski, Mulhern, and Johnson individually. She testified that she talked with Burdzinski alone in his office where she told him that she was still recuperating. She visited with Mulhern in Burdzinski's outer office and asked him "how the job was going," and Mulhern responded, "Fine, we're holding the job for you. Get well and come back."³⁹ Gilmore testified that a few minutes later she next visited the inspection room, a quiet enclosed room, where she talked with Johnson "about returning to work a signing union card." She testified that she then signed a union membership card and a dues-checkoff authorization card and gave them to Johnson, and that she also gave her medical release forms to Johnson in order that she might deliver them to Burdzinski. She did not explain why she did not give them directly to Burdzinski to whom she had just spoken. Gilmore testified on direct examination after testifying that Johnson was in the inspection room, that Mulhern was also present and that at some point Mulhern, without saying anything, "just kind of turned in his chair . . . like to recognize who was talking." On cross-examination she testified that Mulhern had entered the room about 90 seconds after she did and was "doing something with his hands" at his desk about 7 feet away.⁴⁰

Johnson testified that Gilmore entered the room which she characterized as the "lab" after Burdzinski had refused to see Gilmore because he was too busy and that Gilmore therefore asked her to transmit the medical releases which they had discussed earlier in October.⁴¹

November 19, 1979, and a memo dated November 1, 1979, which reflects nonsensically that Gilmore requested and was granted an "extension of her leave of absence until 11/19/79." That patent ambiguity raises questions as to the reliability of Burdzinski's recorded data. Accordingly, I rely on Gilmore's testimony.

³⁹ Gilmore's testimony regarding these conversations with Burdzinski and Mulhern are uncontradicted.

⁴⁰ She conceded that she had no ability to estimate distances and that her estimates were meaningless. She had testified that the size of the inspection room was the size of the hearing room which I take notice of being about 20 feet wide and 30 feet long. Her testimony was uncontradicted. However, I doubt her testimony that a normal conversational tone at one end of the room could be heard at the other end. Moreover, she appeared to be a soft-spoken person.

⁴¹ Johnson testified that in October Gilmore came to her and told her that Burdzinski instructed her to obtain more specific medical releases. Gilmore's testimony did not indicate the details of their October conversations and was silent in this regard.

Johnson did not explain the basis for the conclusion that Burdzinski had refused to see Gilmore.

Johnson testified that Gilmore came into the lab during Johnson's lunch break and that Mulhern and Francis Davis, the government inspector was also present. She corroborated Gilmore as to the union card and checkoff card execution, and testified that she later gave Burdzinski the medical statement and the checkoff authorization at 3:30 p.m. on that day. Johnson conceded that the collective-bargaining agreement had not yet been executed by the parties and could only explain pursuant to Respondent's counsel's suggestion that she was "anticipating" its execution. Johnson was silent as to Mulhern's location in the room, and as to his conduct. Gilmore testified that she signed two sets of membership and checkoff authorization cards for Johnson on two different occasions, the first of which was about early or mid-October 1979, in the plant parking lot, and the second of which was in the inspection room in November. Johnson testified that Gilmore signed two different union checkoff cards, the first of which was in November 1979, and the second of which was in December 1979, and that the former was the first card which she delivered to Burdzinski. The General Counsel did not produce or offer into evidence Gilmore's membership cards.

At the end of November 1979, the Union had presented to Respondent the first group of dues-checkoff authorization cards. In an affidavit submitted to the Board during the investigation of this case, Union Vice President Ronald Combs attached a list of the names of those employees. Gilmore's name was not among them. In attempted explanation Combs testified that there were three or four separate sets of signed cards, and that the first set of 70 cards had been lost and that it was possible that her card was one of the lost cards. He thus impliedly conceded the accuracy of that affidavit. He testified that a dispute arose between the Union and Respondent thereafter regarding subsequent sets of cards as to the language thereon and that employees were requested by the Union to reexecute union cards and dues-checkoff authorizations. Respondent adduced into evidence, without objection a dues-checkoff authorization card signed and dated by Gilmore, which bore the execution date of February 4, 1980. Burdzinski testified that was the only dues-checkoff authorization that he had ever received for Gilmore.

Because of the inconsistencies between Gilmore and Johnson in their testimony, the contradiction of their testimony by the face of the February 4, 1980, dues-checkoff authorization, the absences of Gilmore's card among those presented to Respondent at the end of November, the improbability of Johnson's presentation of a dues-checkoff card to Burdzinski in early November prior to the effective date of the contract and prior to the Union's submission of its first group of cards, I credit Burdzinski that the only dues-checkoff authorization for Gilmore he received was that dated February 4, 1980. Therefore, I cannot credit testimony that Gilmore signed a membership and checkoff authorization card in early November in the inspection room. Furthermore, I cannot conclude from Gilmore's vague and uncertain testimony

that Supervisor Mulhern was so situated in the inspection room (lab?), at a time and location that he necessarily must have heard the discussion between Gilmore and Johnson or that he observed what had transpired.

Gilmore testified that on or about November 16, she again visited Burdzinski at his plant office and that he told her that there had been a "cut-back on inspection" and that she would have to operate a machine. She testified, without contradiction, that on encountering Mulhern as she departed Burdzinski's office, Mulhern in response to her question told her he did not know why she was being taken off inspection work. Gilmore testified that the next day Burdzinski telephoned her and advised that the "job that he had in mind—didn't go through or whatever," and that she ought to file for unemployment compensation.

Burdzinski's testimony as to the planned attrition of the inspection position and other nonproducing positions as part of his personal and individually conceived and implemented "war on waste" is uncontroverted and in part corroborated by business records. Upon Burdzinski's assumption of duties as a personnel director "fresh out of college" he found an employment complement of about 350 persons, and a projected employment ceiling of about 400 persons. After a period of observation and self-styled "snooping," he conceived a variety of schemes to reduce the employment level and other cost factors, including his boldly conceived plan to eliminate the third shift and to proportionately augment the other shifts which, after utilizing his powers of persuasion to convince his doubting, reluctant elder superiors, was effectuated in January 1979. Respondent had never abided by any seniority practice regarding layoffs and had never implemented any bumping practice. The entire third shift was laid off almost in its entirety. Gradually some employees were recalled to other shifts.

Burdzinski testified that he became aware of Gilmore's "existence" in 1979 when he was advised of her unexpected surgery. He testified that she had been on a leave of absence "for quite a while," and had requested and was granted more time off. He testified that at some undisclosed date during her leave of absence it had occurred to him that her Supervisor Jack Mulhern had not requested a replacement. This necessarily must have occurred sometime in November after she was granted an extension of her leave of absence. Burdzinski then investigated and found that no one had replaced Gilmore on her job and therefore he concluded that "it didn't make sense to bring a person back who we didn't need [on her old job.]"⁴² Again, without specifying the precise date of those occurrences, Burdzinski testified that in November 1979 he so informed Gilmore and that she became upset. He further testified that Mulhern became upset but that Mulhern did not "understand the whole picture," and did not understand what Burdzinski was trying to accomplish, and that "this particular move was part of a total Company wide effort" that he was engaged in.

⁴² He did not explain the premise for his conclusions, i.e., whether inspection work itself was reduced, whether her inspection duties were absorbed by others, or whether her inspection duties were simply not being performed. His testimony, however, was not controverted.

Burdzinski attempted to educate Mulhern but Mulhern was not "receptive" and "never really endorsed the idea." Gilmore was third in seniority of a maximum crew of 18 inspectors, and had an almost flawless record for an unusually long tenure in a plant of high employee turnover. Gilmore testified without contradiction that there were seven inspectors whom she could recall that were employed when she last worked as an inspector. Burdzinski testified without controversion that as of the date of the hearing, the inspector position had been completely eliminated. The managerial decision to reorganize and reduce the inspector department was effectuated on February 27, 1979. By the time of the hearing, employment had been reduced from a high of 350 to 150. Burdzinski testified that during his conversation with Gilmore he told her that he was going to find another job for her and that he expected no difficulty in finding another job and that he told her of certain jobs that he had in mind but that she refused, stating that she was not interested in any job but her old one. Burdzinski testified that he mentioned specifically a machine operator's job which at that time was undergoing a high turnover rate, and other jobs like assembler or janitor, but that she remained upset and adamant. According to Burdzinski, he told her that he intended to "have an open mind to try and find something that could please her the most and minimize this discomfort to the maximum extent." Burdzinski testified that he volunteered later offers to recall her to other jobs as a gratuitous, goodwill gesture inasmuch as the collective-bargaining agreement subsequently executed provides only for the right of recall to the employees' old position.

In November, but prior to the execution of the collective-bargaining agreement Gilmore filed a grievance concerning her nonreinstatement as an inspector through the Union and it was accepted and processed, as Respondent had agreed to implement the grievance procedure in advance of contract execution. That grievance proceeded to arbitration, where it was ultimately held to be nonarbitrable. In 1980, at least 40-50 grievances were processed by the Union. Prior to the execution of this contract, during its negotiations, union representatives raised questions as to the status of Gilmore and the reasons for her nonreinstatement but were given no definite response. However, the Union raised questions as to the status of an indeterminate number of other employees during this same period of time.

In January 1980, Burdzinski, by letter, invited Gilmore to indicate whether or not she was interested in an assembly job opening. Subsequently at a meeting with Burdzinski she was advised that she would be required to be interviewed by and to perform an assembly test for the foreman and was instructed to speak to the foreman directly. She telephoned Steward Johnson who, she testified, told her directly it was permissible to take the test. Johnson testified that she then telephoned Combs to inform him and that Combs responded that he would contact Burdzinski. She did not explain his purpose. Combs testified, however, that Johnson told him that Respondent had recalled Gilmore to work and that he then telephoned Gilmore who confirmed it and that he then

told Gilmore to report for work. Gilmore testified to no such conversation.

Subsequently, Gilmore performed the assembly test sometime in mid-January. Burdzinski testified that many persons were interviewed for the job and the foreman selected "the person [whom] he felt was the most qualified and best suited . . . the needs of that particular position." The person awarded the job was Lucinda Simpson, who had been interviewed, according to Burdzinski, in the fall of 1979.

Gilmore testified on direct examination that Burdzinski telephoned her on the same day that she took the assembly test and asked her why she had telephoned Johnson and Combs and then asked her why she had joined the Union to which she enigmatically responded as follows: "I told him that I was a Union member, that's why I joined." The General Counsel offers no suggestion as to why such an interrogation of union membership seemingly prompted by repeated telephone calls to the Union emerged almost a month and a half after Burdzinski supposedly was given a copy of a dues-checkoff authorization. On cross-examination as to this telephone conversation, she gave the following account:

He asked me had I called Ron Combs and Sondra Johnson. And I said yes. And then he asked me why, and I told him because of the Union. He asked me why, and I said because I was a Union member. And the exact conversation I don't know, but that's the part I remember.

Gilmore admitted that during the investigation of this case she gave an oral account by telephone to the Board agent which he accurately recorded in a confirming letter to her as follows:

You informed me that on the occasion of your evening telephone conversation with Gayston Personnel Director Bernard Burdzinski concerning your interview for an assembly position, that Burdzinski told you that there was a rumor you worked a couple of hours and quit, and that he wanted to know if you were spreading such a rumor. You said that you did not recall Burdzinski mentioning Ronald Combs during that conversation.

Subsequently, upon receiving that confirming letter she added the following and submitted it to the agent:

I do recall him (B) asking me if I had talked to Ron Combs also (B) wanted to know why.

In testimony she explained that she did not recall the entire conversation when she first talked to the Board investigator. Significantly she did not include the query as to why she joined the Union in her amendment to that oral statement.

Combs testified that a "couple of days" after his first conversation with Gilmore regarding the assembly job he received a call from Gilmore who told him that she was recalled to her job, permitted to work only 30 minutes, and then sent home. This is, of course, contrary to what Gilmore testified had happened, i.e., that she was

only permitted to take a test. Gilmore testified to no telephone conversation with Combs immediately after taking the mid-January assembly test, and her testimony implies that there was none. Johnson testified that she had only two conversations with Gilmore, i.e., the first call regarding the impending test, and the second which occurred much later when the results were announced, and that she said nothing to Combs in the nature of Gilmore having been recalled to work and sent home after an half hour. Combs and Burdzinski have a common recollection however, that on the day of the test, after the test Combs did call Burdzinski and inquired of him why Gilmore was recalled for such a short period of time only to be sent home. Burdzinski testified that after explaining to Combs he telephoned Gilmore and asked her why she was confused but that she responded as though she had understood fully the nature of the test. He denied any inquiry as to why she called the Union or concerning her relationship to the Union. Thus Gilmore's first oral account of the conversation given to the Board investigator is in accord with Burdzinski's testimony. In light of Combs' testimony, I conclude that Burdzinski's call to Gilmore becomes understandable as an effort to discover the basis of what reasonably appeared to be a misunderstanding between himself and Gilmore. Combs testified that he called Gilmore and told her that Burdzinski would communicate to her later a decision as to the assembly job. Gilmore was silent in her testimony as to such conversation.

Subsequently, Gilmore was notified by letter dated January 21, 1980, that she was not selected for the assembly job and that although she had "demonstrated a fine record of achievement," her "background is not compatible" with Respondent's manpower needs at that time. She was told that she would be considered for future openings.

Combs testified that subsequently Gilmore called him and advised that she did not obtain the assembler's job and that Burdzinski had asked her "some strange questions about her union activity during the conversation." Combs testified: "I don't recall any specifics. I think he asked her something about—well, what she told me was that he asked her whether or not she had called the Union." Combs testified that he then telephoned Burdzinski and asked him if he had made such statements to Gilmore, but that he denied it and asked permission to call Gilmore. Further, Combs testified that Burdzinski called back and said he had talked to Gilmore and that she was upset "and understood the situation." Combs was patently confused and uncertain in his demeanor. His foregoing account is inconsistent in sequence with that of Gilmore. He admitted to confusing the two conversations. I do not find him to be a reliable witness.⁴³ Furthermore, in light of the many inconsistencies between the testimony of Gilmore, Johnson, and Combs, and coupled with Gilmore's uncertain, hesitant demean-

⁴³ However, I credit his testimony that Gilmore told him that she had been rehired and permitted to work for an half hour only, as his subsequent conduct corroborated by Burdzinski only makes sense if he is credited. I further conclude, based upon Gilmore's testimony which reveals that she had no such actual understanding, that she misrepresented to Combs the nature of the assembly test and interview for reinstatement.

nor, and admitted prior accounts of her telephone conversation with Burdzinski, I conclude that Burdzinski's recollection of the telephone conversation with Gilmore is more reliable. I conclude that he did not ask her whether she called the Union nor why she joined the Union. I conclude that she did not tell him that she had joined the Union. I conclude that in any event, had he asked her why she called the Union, such query within the context of the patent confusion of the situation did not constitute coercive interrogation of union activities but rather would have been a simple attempt to find out whether and why she possessed a misunderstanding about the assembly test.⁴⁴

Finally, the General Counsel adduced no evidence, nor made any challenge to Burdzinski's generalized testimony that the person actually hired for the assembly job was more qualified than Gilmore. Furthermore, the General Counsel adduced no evidence as to whether any of the remaining inspectors who had been retained in that position were any less qualified or possessed poorer work records than Gilmore, nor that the seniority differences were of an appreciable measure.

Gilmore testified that sometime in February 1980, she received a telephone call from Burdzinski wherein he asked whether she was interested in a plant janitor position; that she asked the qualifications; that he told her she had to be able to lift a 100-pound weight overhead; that when she said she would have to consult her physician he said he doubted that she could get his approval; and that when she asked why he had called, Burdzinski stated that he wanted to be certain she had been apprised of every job opening.

Burdzinski testified that after the assembly job rejection, there were several occasions when he contacted Gilmore about job openings and that she stated that she did not want any job but her old job. With respect to the janitor's position he testified that there was no discussion of lifting weights overhead but that Gilmore had asked and he responded that the restrictions on the job were the same as for inspectors and machine operators, i.e., the ability to lift 55-pound weights. He testified that he composed and placed a file memorandum in her records reflecting the conversation. The document adduced into evidence as that memo recites:

I phoned Ms. Gilmore to inquire about her interest in the janitor opening that we have on 2-2 [Building 2, shift 2]. She said that she had no interest in any janitor position for she feels that she couldn't do the work.

There is no reference therein to an absolute rejection of any noninspector job offer. The memo is dated February 5, 1980. In his misleading and evasive testimony on cross-examination, Burdzinski at first testified that Respondent had employed women as janitors in the past. However, he finally conceded that Respondent had em-

⁴⁴ As noted earlier, the evidence indicates that the earliest that Burdzinski had received a dues-checkoff authorization for Gilmore was February 4, 1980. Furthermore, the General Counsel adduced no credible evidence as to when she joined the Union.start

ployed one woman to clean the office area but has subsequently subcontracted that work. Clearly the type of work involved in cleaning the office in no sense could be encompassed with the type of heavy work performed by the plant janitor.⁴⁵

In any event, the General Counsel takes the position that the plant janitor position was one that was beyond the ability of Gilmore to perform, i.e., that she was a slight person who had recently undergone major surgery and therefore could not cope with the arduous and dirty work tasks expected of a plant janitor.

Gilmore testified that in March, Burdzinski next communicated with her by telephone and asked her whether she would accept a position as a machine operator on the second shift, but that she responded as follows:

I told him that I could, but my little girl was sick and I didn't think that I could come in when she was sick because she was in the hospital.

She testified that Burdzinski explained that he needed someone who would be on the job "every day," and that he wanted a commitment from her to be there "every day." The General Counsel then elicited the confusing testimony from Gilmore that she found the second-shift opening unacceptable and explained as follows:

Yes, because I'd have to—. My little girl, like I said, she was sick at the time, and I didn't want to leave her at night because that's when she was sickest—at night in the evening time.

She testified that she explained that to Burdzinski. No attempt was made to clear up this patent inconsistency. Either she could not accept the job because her child was in the hospital and she could not guarantee her daily attendance, or she could not accept it because her child was "sickest" at night necessarily requiring her personal attention presumably at home.

Gilmore testified that when she first started her job in 1973 or the first part of 1974 there had been a time when the third shift was started and employees had been asked for a preference of shifts and that she expressed preference by way of a "paper" that was passed around for the third or first shift because of "babysitter problems."⁴⁶ She admitted that when she was first employed there were two 12-hour shifts and that she had worked the shift which commenced at 5 p.m. Later she worked the 11 p.m. to 7 a.m. shift. She admitted further that during her ensuing work history she had worked all hours and there had been occasions that she worked any hour on the clock. (The second shift offered to her in March was 3 to 11 p.m.) Gilmore did not explain why she did not raise the shift problem when Burdzinski had previously offered the janitor job if her preference had persisted.

Gilmore testified that she telephoned Burdzinski's office three times thereafter, twice in March and once in April. She was unable to contact him in March, but was

⁴⁵ His disingenuous testimony in this regard is indicative of his inclination to twist and shade the meaning of words to Respondent's advantage. Recall his testimony wherein he characterized "prizes" as "bonuses."

⁴⁶ The implication in this testimony is that the babysitting problem persisted, but she did not explicitly testify so.

successful in the April call. According to her, he told her that there were no jobs open as Respondent was cutting its employment level. However, she testified that subsequently in April Burdzinski telephoned her and offered her a machine operator's job on the second shift. According to her, she told him that her little girl was still sick and that she could not accept the second shift but would accept "any job" on the first shift. He then told her that the second-shift opening was the only one available. She testified that she again told him that her child was ill and that she could not guarantee that she would be able to work every day. He insisted on a commitment but she refused. Thus she did not accept the job and was not contacted thereafter. There is no indication in her testimony that she made any effort to explain to Burdzinski whether her child was at home or in the hospital at that time, and why it was that her presence with the child was necessarily required during the second shift.

Burdzinski testified that he did offer Gilmore the second-shift operator job on two occasions after he had offered her the janitor job. He did not explain why he did this if, in fact, Gilmore had, when she rejected the janitor's job, told him that she would accept only an inspector's job. He testified that he came to talk to her about a machine operator's job on the occasion when she visited the plant, and he advised her of the second-shift position opening. He testified that she explained "her problems" and the reasons why she could not accept the second-shift assignment but that he explained to her that he was trying to get her back into the work force and told her that if she accepted the second-shift job that he would do everything in his power to attempt to get her back on the first shift and reminded her that at one time or another she had worked every hour during the day.⁴⁷ Burdzinski testified that Gilmore stated that she was not interested in an operator's job because she wanted her old inspection job, and that he explained to her that the probability of an opening in an inspector's job was unlikely inasmuch as the number of those positions was declining as that department was continually being reorganized and reduced. Clearly the number of inspectors was, in fact, in a steep decline.

Burdzinski testified that he maintained records of "all major developments," and memorialized all important communications. He identified file memorandums which he composed and inserted into Gilmore's personnel file. The first record of any contact with Gilmore after the janitor job discussion, according to these memorandums, occurred on March 25, 1980, when Burdzinski called her home by telephone and left a message to which she responded later that day. According to a file memorandum, contrary to his testimony, Gilmore telephoned him. The file entry merely reflects "Mrs. Gilmore called me to explain that she cannot accept the position I offered to her because of babysitting problems that would be encountered if she worked on second shift." There is no

⁴⁷ Gilmore did not rebut this testimony, and in cross-examination testified, with great uncertainty in demeanor that she did not "remember" Burdzinski's promise to transfer her to the first shift. Because of Gilmore's lack of certitude, I credit Burdzinski in this regard.

reference to any discussion about an inspector's job, nor any reference to a rejection of all other jobs.

The next file entry is dated April 18, 1980, and reflects that Gilmore was offered a position of second-shift operator which she refused because it would "create problems for her children." Again there is no reference to a discussion of an inspector's job. A separate file memo of the same date reflects the following entry by Burdzinski.

I came to the conclusion that Ms. Debra L. Gilmore is not interested in a machine operator job since she has turned down two machine operator jobs in recent months, even though I told her that if she would accept a second shift position that I would try to get her on first shift as soon as possible.

I will continue to try to find her an inspector job.

Burdzinski testified on cross-examination that he did not memorialize the discussion concerning Gilmore's insistence upon an inspector's job for the same reason that he did not record all words spoken such as the salutation, "hello, this is Bud Burdzinski," etc. His explanation is flippantly nonresponsive. If such a conversation had occurred, it certainly would have been as important as what Burdzinski had recorded and as an important element it would have been recorded if Burdzinski is to be believed that he recorded all important matters. Furthermore, in light of Gilmore's efforts to obtain the assembly job, Burdzinski's account of an obstinate insistence upon obtaining only the inspection job is contrary to Gilmore's past conduct and highly improbable. Finally, Burdzinski's own memorialized reasoning process reveals that he based his conclusion that she wanted only the inspector job not upon any express rejection of other jobs, but simply upon her insistence upon a day-shift position. Certainly that conclusion could have been more soundly based, but I find that it could not have been based upon an express statement of Gilmore because such was not made to him.

Burdzinski testified that he subsequently considered Gilmore to have been terminated by the terms of the collective-bargaining agreement. A maximum of 1 year is provided for leaves of absence and the agreement also provides in the seniority proviso that loss of seniority, i.e., termination, occurs upon nonreturn after expiration of a leave of absence, or nonrecall from layoff for a period equal to a length of service or 1 year, whichever is lesser.

Gilmore's leave of absence expired at the end of November 1979. In effect, she was laid off when she sought to reactivate her employment. It would appear that the anniversary date for termination of her employment would be November 1980 or arguably earlier on August 27, 1980, the anniversary of the day her sick leave began. Several day-shift operators were hired prior to August 27, 1980, and several more thereafter but prior to November 19, 1980. However, even earlier on April 28 and 29, 1980, two new machine operators were hired for the first shift, just 10 days after Gilmore rejected a second-shift position. However, Burdzinski testified that as of April 18, 1980, he considered Gilmore as not desiring

any operator's position, and thereafter no inspection job opened up.

Burdzinski's sudden realization in November 1979 that Gilmore's position could be eliminated raises an unanswerable question as to the timing of the decision, i.e., long after the attrition process commenced and shortly after Gilmore was assured that her job remained open. However, the General Counsel has failed to prove by clear, credible evidence that Gilmore joined in or engaged in activity on behalf of the Union in proximity to that decision. Furthermore, although the General Counsel stressed her seniority in the department, no evidence was adduced that she was treated in a disparate manner, or that Respondent acted in a manner contrary to past practice or to its own business interests by, in effect, laying off an employee on sick leave rather than laying off a less senior, actively employed inspector. I therefore cannot conclude that Respondent discriminatorily refused to reinstate Gilmore in November 1979.

The General Counsel argues that Respondent thereafter refused to reemploy Gilmore because of her union activities and membership. Gilmore did, as did many other employees, file a grievance. She did so concerning the loss of her inspector's job in late November. The earliest date of Respondent's awareness of her union membership was February 4, 1980.⁴⁸

Despite the filing of a grievance concerning Gilmore's nonrecall to an inspector's job, Respondent offered to recall her to other jobs as they opened. There is no evidence that Respondent was obligated by past practice, policy, or subsequent contractual obligation to make that promise. However, having made that promise, the General Counsel argues that Respondent only offered her jobs of which it was certain that she would refuse, and that when a first-shift job opened which she would have accepted, it declined to offer her that job for pretextual reasons. The question arises that if Respondent had decided to punish Gilmore for seeking union assistance in attempting to get her old job back, why did it bother to gratuitously offer her others jobs and, after she joined the Union in February 1980, knowingly offer jobs that she would not accept? A possible answer is that Respondent sought to lay a foundation for its future expected discriminatory refusal to recall Gilmore to a job opening that she would have accepted and been qualified. Another question arises, why did Respondent solicit her interest in the assembly job of which there is no argument that it suspected that she would reject that job? This is indeed a tortuous course of action in view of the simpler possible action of making no promise at all, which would not have been contrary to any past practice or policy.

The evidence reveals that after the refusal to reinstate Gilmore to the inspector job in November 1979 and to recall her to the assembly job in January 1980, the first day-shift operator's job acceptable to Gilmore became

⁴⁸ In January, Respondent hired another person for the assembly job. There was no evidence upon which I can find that the hiring of that person was executed for reasons other than that advanced by Respondent. Accordingly, I cannot conclude that the nonrecall of Gilmore to an assembly job was discriminatorily motivated.

available on April 28, 1980. Other similar jobs opened thereafter. By February 4, 1980, Respondent had become aware that Gilmore had joined the Union. As noted elsewhere, Respondent had by early 1980, at least, developed a hostility toward the Union, and thereafter demonstrated that it strongly preferred that its employees not retain their union membership. It can be argued that when Respondent had become aware that Gilmore had become a union member, it was by then saddled with its promises to her.

Burdzinski testified that he had by April 18, 1980, concluded that Gilmore did not want any job except her inspection job. In light of the foregoing observations, Burdzinski's credibility is suspect. However, I have severe problems with the credibility of Gilmore. Her testimony as to the two conversations regarding the second-shift openings contains ambiguities, and I found her unreliable in other areas. I do not credit Burdzinski that Gilmore told him explicitly that she desired only the inspector's job. I find this to be a fabrication intended to bolster Respondent's case. However, I do not conclude that he offered her only second-shift jobs with a definite foreknowledge that she would not accept second-shift assignments. Gilmore's preference for the first shift was made early in her career in 1973 or 1974. There is no evidence that this preference which had been entered on a nondescript piece of circulated paper was ever filed and retained. Moreover, thereafter Gilmore worked all hours at one time or another. The evidence thus fails to demonstrate that Burdzinski had certain knowledge that Gilmore would have refused his first offer of the second-shift job. Accordingly, on March 25, he risked Gilmore's acceptance of that job. According to Gilmore's testimony, she rejected the March 25 offer because of an illness of her child and/or the child's hospitalization. From that account, it does not appear that she told Burdzinski that her inability to accept the second shift was due to a permanent babysitting problem. But this is contrary to the position taken by the General Counsel. If we credit Gilmore, Burdzinski again ran the risk of her accepting reemployment when he offered her another second-shift job 3-1/2 weeks later on April 18. I conclude that Burdzinski did in fact promise Gilmore that if she accepted his offer of a second-shift job that he would use that as the first step in getting her reemployed and would thereafter seek to transfer her to the first shift at the first opportunity. Such an offer is indicative of a good-faith attempt to offer reemployment. When Gilmore refused that, Burdzinski testified that he concluded that she was not in truth interested in any machine operator's job. I find that although Burdzinski embellished his testimony with fabrications about Gilmore's insistence on the inspection job, that on April 18, 1980, he did in fact, as his file memo sets forth, conclude that Gilmore was just not interested in a machine operator's job. Although his rationalization process might arguably be faulty, rash, petulant, petty, and unjustified, I cannot conclude that it was a pretext intended to mask an unlawful motivation, i.e., punishment for grievance filing and union membership. According to Gilmore's own testimony, Burdzinski's offer of the second-shift jobs was no mere solicitation of interest but rather he sought a definite commitment and

urged her to make a commitment. As noted, I concluded that his promise to seek day-shift work for her soon thereafter was indicative of good faith. Such solicitations did not constitute mere perfunctory overtures. They were definite job offers. As I have found that the evidence does not establish that Burdzinski had foreknowledge that such offers could be rejected, I conclude that they were genuine offers of reemployment made despite knowledge of Gilmore's union membership. I therefore am unable to find that Burdzinski's conclusion that Gilmore was not really interested in a machine operator's job at all was a pretext for discrimination proscribed by the Act.

CONCLUSIONS OF LAW

1. The Respondent, Gayston Corporation, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, and its Local 768, is a labor organization within the meaning of Section 2(5) of the Act, and has been designated and is the exclusive bargaining representative of the employees in a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act consisting of:

All production and maintenance employees employed by Respondent at its Dayton, Ohio facility including group leaders, inspectors, material handlers, janitors, job setters, operators, toolroom employees, and assemblers, but excluding all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

3. Respondent, by its agents John Alexander and Mark Stone at meetings of employees conducted by them respectively on June 18, 1980, and July 31, 1980, threatened to discharge employees who engage in union or other concerted, protected activities, including, *inter alia*, seeking the assistance of the Occupational Safety and Health Administration of U.S. Department of Labor (OSHA), thereby violating Section 8(a)(1) of the Act.

4. Respondent, by its agent Bernard F. Burdzinski II, on or about October 1, 1980, threatened an employee with discharge if that employee joined the Union, thus violating Section 8(a)(1) of the Act.

5. Respondent, by its agent Gary Pfeiffer in early October 1980, threatened an employee that Respondent would terminate the employment of all union members under his supervision, thus violating Section 8(a)(1) of the Act.

6. Respondent in and about the month of October 1980, by its agent Larry Ray, coercively interrogated employees concerning their own and other employees' union sympathies; ordered an employee to assist in such unlawful interrogation; gave the impression to an employee that he was monitoring other employees' union sympathies; implied to an employee that she would be discharged if she did not withdraw membership and support for the Union; and encouraged and assisted employees from withdrawing membership in and support from the Union; and encouraged an employee to assist him in

encouraging another employee to withdraw membership in and support from the Union and by each such act violated Section 8(a)(1) of the Act.

7. Respondent on and shortly after October 14, 1980, as part of Respondent's scheme to encourage and aid employees to withdraw membership in and support from the Union, by the conduct of its agent Bernard F. Burdzinski, caused to be delivered to employees information and materials for the purpose of withdrawing dues-checkoff authorizations and union membership, and further personally assisted employees in the preparation of such withdrawal request; and by the conduct of its agent Mark Stone who personally expressed his gratitude to employees who had withdrawn from union membership, thereby violated Section 8(a)(1) of the Act.

8. Respondent, by the conduct of its agent Gary Pfeiffer who in October 1980 attempted to induce an employee to eavesdrop and report back the conversations of union members, violated Section 8(a)(1) of the Act.

9. Respondent by the conduct of its agents Gary Pfeiffer and Les Sontarre in mid-January 1981, who attempted to create the impression upon an employee that the union activities of employees were under the surveillance of Respondent, thereby violated Section 8(a)(1) of the Act.

10. Respondent, by the conduct of its agent Gary Pfeiffer in mid-January 1981, who attempted to create the impression upon an employee that the union activities of employees were under the surveillance of Respondent, thereby violated Section 8(a)(1) of the Act.

11. Respondent, by the conduct of its agent Gary Pfeiffer in February 1981, coercively interrogated employees as to why they had joined the Union and thereby violated Section 8(a)(1) of the Act.

12. Respondent, by its agent Bernard F. Burdzinski II, discriminated against Althia Piercy because of her union membership and activities by assigning her to work which was peculiarly onerous and burdensome to her after March 20, 1981, and by placing her on a forced leave of absence on March 30, 1981, until June 8, 1981, from early July 1981 to August 31, 1981, and from August 14, 1981, and thereafter for no justifiable business reason and by each such act violated Section 8(a)(3) and (1) of the Act.

13. Respondent, in bypassing the Union and unilaterally granting employees a general wage increase on July 31, 1980, without having given prior notice to, bargaining with, or obtaining agreement from the Union, effectuated a change in the wage rates and thereby modified its collective-bargaining agreement with the Union and thus failed to comply with Section 8(d) of the Act, and violated Section 8(a)(5) and (1) of the Act.

14. Respondent, in bypassing the Union and unilaterally changing terms and conditions of employment of employees by granting a bonus to its employees in September 1981, without having given prior notice to or opportunity to bargain with the Union, breached its bargaining obligation under the Act and thereby violated Section 8(a)(5) and (1) of the Act.

15. Respondent, by the conduct of its agent Bernard F. Burdzinski II, on September 23, 1981, attempted to create the false impression among its employees that the

Union was opposed to the granting of a bonus and that the retention of the September bonus was in jeopardy because the Union might prevail in the processing of an unfair labor practice charge, thereby sought to discourage employees from supporting the position of the Union and thus violated Section 8(a)(1) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom, to post an appropriate notice to employees, and to take certain affirmative action to effectuate the policies of the Act.

It having been found that Respondent discriminatorily placed employee Althia Piercy on involuntary leave and contrary to its own policy and past practice assigned her to work which was peculiarly onerous and burdensome to her, it is recommended that Respondent be ordered to offer her immediate and full reinstatement to a position for which she had demonstrated or will demonstrate, upon opportunity provided by Respondent, capability of performing without adverse personal physical reactions, if such position is available, or to reinstate her to such position when it next becomes available, without prejudice to her seniority or other rights and privileges, and to make her whole for any loss of pay she may have suffered by reason of the discrimination against her. Any backpay found to be due shall be computed in accordance with the formula as set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1959), and *Florida Steel Corporation*, 231 NLRB 651 (1977).⁴⁹

Having found that Respondent unlawfully effected a unilateral change in terms and conditions of employment of employees without having first notified and bargained with the Union, and that Respondent unilaterally modified the terms of the collective-bargaining agreement without bargaining and obtaining the agreement of the Union, I shall recommend that it cease and desist from such conduct, but nothing herein shall be construed as authorizing or requiring Respondent to withdraw or eliminate any wage increase or any bonus presently enjoyed by its employees.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER⁵⁰

The Respondent, Gayston Corporation, Dayton, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening to discharge employees who join the Union or who engage in union or other concerted, protected activities, including seeking the assistance of the Occupational Safety and Health Administration of the

⁴⁹ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

⁵⁰ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

U.S. Department of Labor (OSHA), or other governmental agencies for the purpose of improving working conditions of employees.

(b) Coercively interrogating its employees concerning their own and other employees' union sympathies.

(c) Coercively interrogating its employees concerning their union membership and their motivations for joining the Union.

(d) Ordering any employee to assist it in unlawful interrogation of other employees' union sympathies.

(e) Attempting to give employees the impression that it is monitoring other employees' union sympathies, and surveilling their union activities.

(f) Implying to employees that they will be discharged if they do not withdraw membership and support from the Union.

(g) Unlawfully encouraging and unlawfully assisting employees in withdrawing membership in and support from the Union.

(h) Encouraging employees to assist it in unlawfully encouraging other employees to withdraw membership and support from the Union.

(i) Providing information, materials, and personal assistance to employees and expressions of personal gratitude to employees in pursuance of an unlawful scheme to encourage and aid employees to withdraw membership and support from the Union.

(j) Attempting to induce employees to eavesdrop and report back to it conversations of union members.

(k) Discriminating against employees because of their union membership and activities by placing them on forced leaves of absence, or by assigning them to work which is peculiarly onerous and burdensome to them for no justifiable business reason.

(l) Without bargaining and agreement with the Union as the exclusive bargaining agent of employees in the following appropriate unit in breach of its obligations under Section 8(d) of the Act, unilaterally modifying or changing the wages, benefits, or other terms or conditions of employment set forth in the collective-bargaining agreement with said bargaining agent or without notice to and giving said bargaining agent an opportunity to request bargaining, unilaterally initiating or changing any other benefits, or terms and conditions of employment in said unit:

All production and maintenance employees employed by Gayston Corporation at its Dayton, Ohio facility including group leaders, inspectors, material handlers, janitors, job setters, operators, toolroom employees, and assemblers, but excluding all office

clerical employees, and all professional employees, guards and supervisors as defined in the Act.

(m) Attempting to give the false impression to its employees that the Union is opposed to its granting of bonuses to employees, or that retention of any bonus or other benefit granted to employees unlawfully by its unilateral action is or will be jeopardized because the Union had filed with the Board and seeks prosecution with the Board of an unfair labor practice charge concerning such unlawful conduct by Respondent.

(n) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action which is found will effectuate the policies of the Act:

(a) Offer to Althia Piercy immediate and full reinstatement to a position for which she had demonstrated or will demonstrate, upon opportunity provided by Respondent, capability of performing without adverse personal physical reactions, if such positions are available, or reinstate her to such position when it next becomes available, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of pay she may have suffered as the result of the discrimination against her in the manner described above in the section of this Decision entitled "The Remedy."

(b) Post at its Dayton, Ohio, plant copies of the attached notice marked "Appendix."⁵¹ Copies of the notice on forms provided by the Regional Director for Region 4, after being duly signed by its authorized representative, shall be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order what steps it has taken to comply herewith.

IT IS FURTHER RECOMMENDED that any allegation of the complaint not found herein to have been sustained by the evidence is dismissed.

⁵¹ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."